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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Railway Labor Act require that permanent employees of an air carrier, who exercised their right to work during an economic strike, must lose their jobs at the end of the unsuccessful strike in order to create vacancies for full-term strikers with more "seniority"—who were permanently replaced by new hires and for whom no vacancies would otherwise exist—when there is no back-to-work agreement and no provision of the former collective bargaining agreement authorizes the exercise of "seniority" rights to obtain reinstatement after a strike?

2. (a) Is a carrier required to displace permanent replacements, who have been hired and treated in all respects as employees and are engaged in required training under the carrier's supervision, and give their jobs to strikers at the end of an unsuccessful economic strike on the rationale that the replacements are not "employees" under the Railway Labor Act?

(b) Alternatively, are such employees not "permanent replacements" simply because they are still in training when the union calls off its unsuccessful strike?

PARTIES

The petitioner is Trans World Airlines, Inc. ("TWA"), a "common carrier by air" within the meaning of Title II (45 U.S.C. §§ 181 *et seq.*) of the Railway Labor Act. TWA has no parent company and no affiliates or subsidiaries, other than wholly-owned subsidiaries.

The respondent is The Independent Federation of Flight Attendants ("IFFA" or "the Union"), an unincorporated labor organization designated as the bargaining representative under the Railway Labor Act for TWA employees in the flight attendant craft or class.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner TWA respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Eighth Circuit entered on May 26, 1987 as holds (i) that some 1,300 flight attendants employed by TWA, who exercised their right not to strike, should have been forced to surrender their jobs to more "senior" strikers when the Union called off its unsuccessful strike, and (ii) that some 400 permanent replacements for strikers should have been required to forfeit their jobs to strikers because the replacements had not quite completed their training when the strike ended.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 819 F.2d 839, 125 L.R.R.M. 2544, is reprinted as Appendix A.[1] It affirms in part and reverses in part a judgment of the United States District Court for the Western District of Missouri, St. Joseph Division, based on a memorandum and order reported at 643 F. Supp. 470, 123 L.R.R.M. 2337, which is reprinted as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 26, 1987. On June 5, 1987, TWA timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The court below entered an order (reprinted as Appendix B) denying the petition on August 31, 1987. (Circuit Judges Bowman, Fagg and Gibson noted that they would have granted the petition; Circuit Judges Ross and Magill did not participate.) This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

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1 The pages of the appendices to this petition are referred to as "____ a."

On September 24, 1987, the Eighth Circuit entered an order (reprinted as Appendix C) staying the issuance of its mandate, to and including October 8, 1987, and pending certiorari proceedings.

STATUTES INVOLVED

The relevant statutory provisions are the Railway Labor Act ("RLA" or "the Act"), as amended, Sections 1, Fifth (45 U.S.C. § 151, Fifth); 2, Third (45 U.S.C. § 152, Third); 2, Fourth (45 U.S.C. § 152, Fourth); 2, Eleventh (45 U.S.C. § 152, Eleventh); 201 (45 U.S.C. § 181); and 202 (45 U.S.C. § 182); and the National Labor Relations Act ("NLRA"), as amended, Section 2(3) (29 U.S.C. § 152(3)). They are reprinted as Appendix F.

STATEMENT OF THE CASE

As foreshadowed by petitioner's reply brief on petition for certiorari which was granted in the earlier case between the same parties and is presently pending in this Court,[2] petitioner now requests the Court to review the second decision of the Eighth Circuit in the TWA-IFFA litigation. That strange decision, with flawed logic and a remarkable succession of misstatements of law and fact, purports to be based on the inapplicable[3] prior decision of the court below that the union security clauses of the 1981-84 TWA-IFFA contract continue in effect.

The decision below holds that employees who chose not to strike ("crossovers") should have been forced to give up their jobs at the end of the strike, in May 1986, to the unsuccessful strikers. In other words, the very employees who were required by the prior decision of the Eighth Circuit to pay dues to the respondent union from April, 1986 to now in order to keep

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2 *Trans World Airlines, Inc.* v. *The Independent Federation of Flight Attendants* ("the TWA Action"), No. 86-1650, *cert. granted*, June 8, 1987.

3 It is simply incomprehensible how or why the obligation of employees to pay dues to a union, against their will, should require those employees to give up their jobs to unreinstated strikers on the basis of a use of "seniority" that was not provided for even in the contract that contained the union security clauses, the continued existence of which is at issue in No. 86-1650.

their jobs[4] must surrender those jobs to strikers who have greater length of service. The court below so held even though the old agreement (as the district court found) did not provide for the use of seniority to return from a strike, and the Union failed to reach a new agreement with TWA about any terms or conditions of employment, much less about a way in which the permanently replaced strikers might come back to work.

At the same time, the court correctly acknowledged that some 2,400 permanent replacements could keep their jobs at strike's end. The anomalous result is that new hires with minimal length of employment who have been hired as permanent replacements for strikers are protected in their jobs, as this Court has held they must be, but permanent employees with considerably more time in the employ of the carrier—who elected not to support the strike, or to return to work at a time when vacancies existed—must surrender their jobs when the strike comes to an unsuccessful end, to the very strikers who were replaced by the new hires or who had become unnecessary because the work force had decreased. The Eighth Circuit nonetheless reversed the district court's clearly correct decision that crossovers were entitled to at least as much protection in their jobs as new hires.

In another untenable distortion of the law with respect to the reinstatement of strikers, the court below said that some 400 new flight attendants, hired as permanent replacements, must give up their jobs to unsuccessful strikers because those replacements had not quite completed their training when the union called off the strike. The Eighth Circuit affirmed the district court on this aspect of the case but disavowed its rationale. The district court had created an admittedly unprecedented "training school" exception to the permanent replacement rule of *Mackay Radio*, saying that new hires did not qualify as permanent replacements unless they completed their training within two days after the strike ended. The Eighth Circuit, however, said that the flight attendants in training

4 There is no question that those monies were used by IFFA to finance the litigation that has now resulted in the decision that the dues-payers must lose their jobs.

when the strike ended were not "employees" at all under the RLA because they did not perform any services for the carrier—despite its recital of their services as trainees under the direction of and in the pay of the carrier. Alternatively, the court below held that the trainees would not qualify as "permanent replacements" under the rationale of NLRA decisions.

Summary of Facts

TWA and IFFA were parties to a collective bargaining agreement with a stated term from August 1, 1981 to July 31, 1984. Following written notice under Section 6 of the RLA (45 U.S.C. § 156), negotiations for a new agreement began in March 1984 and proceeded, without success, through the steps required by the RLA, including direct negotiation, mediation and the final 30-day cooling-off period. On March 7, 1986, approximately two years after negotiations began, IFFA called a strike against TWA. For purposes of this action, it has been assumed that the strike was over only economic issues.[5]

In order to avoid interruption to its services, TWA operated with those flight attendants who wished to continue or resume working and hired permanent replacements for the striking flight attendants to complete its workforce. In the first week of the strike, TWA hired approximately 1,200 permanent replacements and thereafter, up to May 15, 1986, an additional 1,600, some 400 of whom were about to complete their training when the Union called off its unsuccessful strike. (59a, 60a) Those 1,600 permanent replacements, who attended TWA's training program during the strike, at TWA's facilities and under TWA's supervision, were paid by TWA as flight attendants, were covered by all employee benefit plans and began accruing flight attendant seniority on the day they entered training.

5 On March 5, 1986, just prior to the strike, IFFA filed an action in the district court (No. 86-6030-CV-SJ-6) alleging violation by TWA of the RLA by failing to bargain as required by Section 2, First. In that action, IFFA seeks, among other things, a return to the *status quo* conditions on and before March 6, 1986, and the reinstatement of all full-term strikers. That action is pending in the district court, awaiting decision on TWA's motion to dismiss at the close of plaintiff's case.

Some 1,280 crossover flight attendants were also working on May 17, 1986 (61a), when IFFA, on behalf of striking flight attendants, offered to return to work—although there was no back-to-work agreement and no successor agreement to the 1981-1984 Agreement. There were fewer than 200 flight attendant vacancies to be filled at that time; TWA filled those vacancies by rehiring strikers.

The District Court Decision

IFFA commenced this action by filing a complaint on May 30, 1986 in the district court. Jurisdiction was invoked pursuant to the RLA (45 U.S.C. §§ 151 *et seq.*) and Sections 1331 and 1337 of the Judicial Code (28 U.S.C. §§ 1331, 1337).

IFFA's first amended complaint alleged two claims. In Count I, the Union sought a declaratory judgment and appropriate injunctive relief requiring TWA, as of May 17, 1986, to reinstate approximately 3,000 full-term strikers, displacing some 1,200 replacements hired during the first week of the strike and the last 400 hired before May 17, 1986, as well as all the crossovers, on the ground that the flight attendants to be displaced were not permanent replacements. In Count II, IFFA sought similar relief, as to all replacements, on the ground that TWA had no business justification for hiring permanent replacements. On July 21, 1986, IFFA moved for partial summary judgment solely on Count I; TWA's cross-motion for partial summary judgment was also limited to Count I.

In deciding the cross-motions for partial summary judgment, the district court divided the permanent replacements into two groups, splitting off the approximately 463 flight attendants who were in various stages of completing training on May 17, 1986. Relying on the seminal decision of *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) ("*Mackay Radio*"), the district court held that fully-trained new hires could not be displaced by economic strikers. It created, however, what it characterized as an unprecedented " 'training school exception' to the *Mackay Radio* rule" (40a)

that would permit strikers to displace the permanent replacements who had not quite completed their training on May 17.

With respect to the crossovers, relying on the principles of *Mackay Radio* and upon this Court's decision in *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("*Erie Resistor*") that "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers," the district court held that none of the crossovers were subject to displacement by unreinstated strikers. (25a)

The court stayed its order for the displacement of the flight attendants in training, pending appeal, because it believed the issue to be "close and lacking in precedent." (40a)

The Court of Appeals Decision

Citing *Mackay Radio*, the Eighth Circuit affirmed[6] the district court's judgment that the new hires, other than the "trainees," were employed as permanent replacements and therefore were not subject to displacement by returning economic strikers. It rejected the district court's formulation of a "training school exception" for permanent replacements, which allowed a two-day period after the end of the strike for completion of training (14a), but nevertheless affirmed the decision that the flight attendants in training were subject to displacement by returning strikers. The Eighth Circuit's curious rationale—which had not even been argued[7]—was that the flight attendants in training, although on TWA's payroll and treated in all respects as employees, were not "employees" under the RLA. (11-12a) Alternatively, applying a so-called "balancing test" that it purported to find in *Mackay Radio*, the court concluded that unreinstated strikers were entitled to the positions held by the trainees because TWA had shown "no

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6 The Eighth Circuit had jurisdiction, under 28 U.S.C. § 1292(a), to review the district court's decision because it both granted and denied injunctive relief.

7 The parties stipulated that the flight attendants in training "were hired as TWA employees on their first day of training." (60a)

business justification" for continuing to employ the replacements after the strike ended. (13-14a)[8]

The court below acknowledged that the "trainees" had actually been hired as permanent replacements for striking flight attendants, had been paid flight attendant salaries, had received all flight attendant benefits and had accrued flight attendant seniority. (2-3a)[9] It held, however that

> The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the *payment of salary*. [Emphasis added] Rather, RLA coverage is determined by the *work the person performs* [emphasis in original] under supervision of the employer. (12a)

The court found that the "trainees" had not performed work for TWA "by any stretch of the imagination" (12a)—although their training was essential to TWA, and the National Mediation Board, the agency charged with the primary responsibility of determining who are employees under the RLA, has held that trainees in the employ of a carrier are "employees." *Scheduled Skyways*, 10 N.M.B. 488 (1983) (reprinted as Appendix K).

Proceeding on its unprecedented course, the Eighth Circuit reversed the district court's holding with respect to the cross-overs, reasoning that the crossovers could not be "considered permanent replacements" because, under its decision in the TWA Action, "the union security clause . . . remains in effect . . ." and "all cross-overs must retain their union membership." (7a) Therefore, it said:

8 The Union's claim that TWA did not have a business justification for treating new hires (including the "trainees") as permanent replacements was contained in a separate Count II of the complaint and was not even before the district court on the parties' cross-motions for summary judgment, which were limited to Count I.

9 It also acknowledged that "[t]he training of new people to fill strikers' positions was appropriate in fulfilling TWA's [legitimate] interest." (13a)

> . . . TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity. (7a; footnote omitted)

The court below relied on *Erie Resistor*, where this Court prohibited the grant of "super-seniority" to those who worked during a strike while holding that an employer need not discharge those employees in order to provide places for strikers.[10] At no point in its opinion did the Eighth Circuit identify the source of its apparent view that strikers are entitled to reinstatement in seniority order, or make any mention of the district court's finding that the 1981-84 contract between IFFA and TWA "does not authorize the exercise of seniority rights to obtain reinstatement after a strike." (22a) Nor did it acknowledge that TWA had done nothing to give the crossovers the kind of preferential treatment disapproved in *Erie Resistor*, but simply left them in the jobs to which they returned during the strike.

The court stayed its mandate pending certiorari proceedings. (17a)

REASONS FOR GRANTING THE WRIT

Both aspects of the decision below establish novel and irrational departures from well understood and long accepted relationships between management and labor, strikers and non-strikers and the Railway Labor Act and the National Labor Relations Act. Until this case,

- No court or administrative agency has suggested that positions occupied by early returning strikers must be treated as available vacancies at the end of a strike;

10 The super-seniority granted in *Erie Resistor* would have applied in the event of future layoffs after full-term strikers had returned to work; it had nothing to do with the right of the crossovers to remain in their jobs at the end of the strike.

- It has been a settled principle that strikers have no right to be reinstated in seniority order, absent a back-to-work agreement so providing;
- No court or administrative agency, under the RLA or the NLRA, has required the displacement of permanent employees in order to make room for returning economic strikers (*cf. International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), discussed *infra*, pp. 16 n.15, 28);
- Neither the courts nor the National Labor Relations Board has applied the "balancing test" that the Eighth Circuit purported to find in *Mackay Radio*, or required an employer to show "business justification" for continuing to employ permanent replacements after a strike ends;
- Neither the courts nor the National Mediation Board has concluded that employees in training are not "employees" within the meaning of the RLA; and
- No case has held that permanent replacements for economic strikers must forfeit their jobs to returning strikers unless the replacements are fully trained before the strikers offer to return to work.

Thus, the decision below radically alters the balance of bargaining power between management and unions, distorting and misapplying this Court's decisions in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

The practical effects of the Eighth Circuit's unprecedented and illogical decision are to deprive TWA (and other employers) of one of the principal self-help weapons in response to a strike (*i.e.*, the right to retain employees who choose to work during a strike) and to diminish the right of some 1,300 flight attendants in this case (and future crossovers in other cases) to refrain from engaging in concerted activity against their employer so as not to put their jobs at risk. It also creates the anomaly that employees newly hired as replacements for

strikers after the strike begins (who have minimal length of service) need not yield to strikers' job claims (unless they have not completed training), but employees with years of service, who exercised their right not to join the strike (or to abandon it and return to work before the strike ended) must yield their jobs to the same strikers.[11] The Eighth Circuit's decision, if not reversed, will eliminate the principal motivation that employees in a bargaining group who are "junior" to strikers have to return to work during a strike, and will force employers to replace strikers with new hires rather than have the benefit, during a strike, of the services of the willing experienced employees they would prefer.[12]

The Eighth Circuit acknowledged that "economic strikers are entitled to reinstatement only as vacancies occur," and that an employer "is not required to discharge permanent replacements in order to rehire striking employees." (5a) It failed to cite any authority, because there is none, for the view that TWA was obligated to *create* vacancies for "full-term strikers" (*i.e.*, those who did not return during the strike) by displacing permanent employees—whether new hires, earlier returning strikers or non-strikers. Purporting to rely on *Mackay Radio*, the court below nonetheless held that only new-hire permanent replacements, not crossovers, could retain their jobs at the end of a strike—and then only if the Union does not call off its

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11 Under the Eighth Circuit's reading of *Mackay Radio* and *Erie Resistor*, if the 100 most junior employees in a workforce of 200 choose not to strike, and if the employer hires replacements for the 100 strikers, the workforce at the end of the strike must be reconstituted to consist solely of the strikers and the newly hired striker replacements. Thus, the employees who did *not* strike lose their jobs as the result of the employer's decision to replace those who did! This Court cannot have intended *Mackay Radio* and *Erie Resistor* to have such a bizarre result.

12 Crossovers could avoid displacement at the end of the strike, under the Eighth Circuit's holding, only by quitting their jobs, forfeiting their seniority for all purposes and returning to work as new-hire replacements. The unlikely prospect of that event highlights the illogic of the holding below, as well as the extent to which it would impermissibly interfere with the right of a carrier to operate during a strike and the rights of its employees to refrain from engaging in concerted activity.

strike before the permanent replacements have completed their training. In effect, the Eighth Circuit thus gave the Union a back-to-work agreement that it had not negotiated and could not win for itself.

This Court should review and reverse the decision below because (1) it is contrary to the decisions in *Mackay Radio* and *Erie Resistor*; (2) it is in conflict, on the crossover ruling, with the decisions of the Sixth Circuit in *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985) and *NLRB* v. *American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987), and of the Seventh Circuit in *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982); and, on the trainee issue, with the decisions of the Second Circuit in *H.F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) and of the Seventh Circuit in *NLRB* v. *Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983); (3) it misinterprets provisions and decisions under the National Labor Relations Act and the Railway Labor Act and erroneously applies concepts and provisions of one Act to the other, unsettling decades of firmly established national labor policy; and (4) it is based on an incredible series of misstatements of law and fact and thus so far departs from "the accepted and usual course of judicial proceedings" as to call for the immediate exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

I. THE EIGHTH CIRCUIT'S DECISION THAT CROSSOVER FLIGHT ATTENDANTS MUST BE DISPLACED BY FULL-TERM STRIKERS WITH MORE "SENIORITY" IS CONTRARY TO PRINCIPLES ESTABLISHED BY THIS COURT.

For fifty years federal labor law, under the National Labor Relations Act, has struck a delicate balance between the employee's right to strike and the employer's right to continue to operate during a strike. *See NLRB* v. *Mackay Radio*, 304 U.S. 333, 345-46 (1938); *NLRB* v. *Erie Resistor*, 373 U.S. 221, 232-34 (1963); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 524-28 (1983) (Brennan, J., dissenting). The Eighth Circuit's unprecedented and unsupportable decision misconstrues the NLRA precedent on which it purports to rely, radically upsetting that carefully crafted and maintained balance, and then compounds the error by applying the misstated NLRA law to the Railway Labor Act.

In *Mackay Radio*, 304 U.S. at 345-46, this Court announced the fundamental principle, uniformly followed by the courts until now, that an employer has

> the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them . . . . [It is] not an unfair labor practice . . . *to reinstate only so many of the strikers as there [are] vacant places to be filled.* (Emphasis added; footnote omitted)

This fundamental decision was not limited to replacement of strikers by newly hired employees. Its whole import is that strikers are entitled to be reinstated only to the extent that there are vacant places to be filled. The choice of incumbent employees not to join a strike or to refrain from supporting it for its duration prevents the creation of vacancies in the positions held by those employees. There is nothing in *Mackay Radio* that gives strikers, when the strike is called off, the right to treat those occupied positions as vacancies. Nor is there anything in the decision that contemplates that strikers may use their pre-strike seniority to displace from those non-vacancies the employees who are occupying the jobs.

In fact, the very replacements at issue in *Mackay Radio* were crossovers. They were employees at the time of a nation-wide strike against the company, who chose not to join the strike and were transferred to a location where their services were needed. *See* 1 N.L.R.B. 201 (1936). This Court's later decision in *Erie Resistor*, moreover, makes clear that the term "permanent replacement," as used in that decision and subsequently, is

not confined to new hires but includes any permanent employee who worked during the strike. Thus, the Court said:

> Under the decision . . . [in *Mackay Radio*] an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. 373 U.S. at 232.

And then further describing the *Mackay Radio* decision, the Court said: "[T]he employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers . . . ." *Id.*

The conclusion is inescapable, therefore, that the Court included in the category of "permanent replacement" all "those who worked during the strike" as permanent employees and not just those who were newly hired to fill places left vacant by strikers.[13] If all the employees of a company went out on strike when it began and, during the strike, half of the positions were filled by new-hire permanent replacements and the other half by early returning strikers, the Court cannot have intended that somehow half of the positions still remained to be filled by strikers when the strike is called off. In construing NLRA § 2(3), which has no parallel in the RLA, the Court went no further than to say that it "preserves to strikers their *unfilled* positions and status as employees during the pendency of a strike." 373 U.S. at 233 (emphasis added).

On May 17, 1986, when IFFA offered to return to work "on behalf of all . . . employees . . . who went on strike and have not returned to work to date" (51a, 59a), fewer than 200 places were vacant, the remainder having been filled by new-hire permanent replacements and crossovers. Ignoring decades of authority holding that economic strikers are entitled to reinstatement only "[i]f and when" vacancies are available, *see, e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 381

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13 *See also* the Third Circuit's decision in *Erie Resistor*, 303 F.2d at 360, where the court described the "replacements" as "includ[ing] new employees, employees on layoff status and returning strikers."

(1967),[14] the court below announced the astonishing new rule that vacancies must be created for economic strikers by displacing employees who exercised their right either not to strike or to return to work during the strike at a time when vacancies existed.

The Eighth Circuit's fundamental misconception of the law is demonstrated by its repeated statement that TWA had "accorded," "rewarded" or "granted" crossovers "permanent replacement" status. TWA did not award permanent status to the crossovers; they were permanent employees before the strike started. They did not need to be "replacements" for others; they simply continued to work for TWA, thereby preventing vacancies in the jobs they occupied. No principle of law, logic or labor policy can be found to justify the displacement from their jobs of permanent employees who work during a strike. *Mackay Radio* clearly gives the employer the right to fill places left vacant by strikers; that principle cannot be distorted into a rule of law that strikers may claim jobs not left vacant but, rather, filled by non-strikers.

II. THE DECISION BELOW IS IN CONFLICT, ON THE CROSSOVER ISSUE, WITH THE SIXTH AND SEVENTH CIRCUITS AND, ON THE TRAINEE ISSUE, WITH THE SECOND AND SEVENTH CIRCUITS.

A. Crossovers

In *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985), in contrast to the decision of the court below, the Sixth Circuit held that an employer could not be compelled to permit strikers to exercise their pre-strike seniority to obtain full-time (rather than part-time) jobs, in preference to replace-

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14 *See also Vulcan Hart Corp.* v. *NLRB*, 718 F.2d 269, 274 (8th Cir. 1983) (where the court stated that strikers "are entitled to reinstatement as vacancies arise, although they may not displace permanent replacements"—making no distinction between the 7 crossovers and the 23 new-hire replacements before it); *Lodges 743 and 1746, International Ass'n of Machinists* v. *United Aircraft Corp.*, 534 F.2d 422, 442 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976) ("No case insofar as we are aware, has required an employer to lay off its active employees so as to make room for strikers.").

ments *and earlier returning strikers*. The Sixth Circuit thus clearly held that strikers could not displace crossovers.

In its very recent decision, *NLRB* v. *American Olean Tile Co.*, No. 86-5308 (6th Cir. August 13, 1987) (*reprinted in* 160 Daily Lab. Rep. (BNA) D-1), the Sixth Circuit again confirmed that crossovers who worked during a strike need not yield their jobs at the end of the strike to more senior strikers. The court went even further and said that the employer could use a chronological list of employees who offered to return during the strike when there were no vacancies, to fill vacancies that arose *after* the strike. (On the latter point there was a dissent, but that question is not in this case.) The Sixth Circuit's approval of the reinstatement of strikers in the order in which they offered to return to work, reaffirms the conflict between that circuit and the Eighth Circuit which was created by the decision below. The novelty of the Eighth Circuit's ruling, moreover, is established by the reference of the Sixth Circuit to the concession of union counsel there that "use of the chronological list was lawful during the strike." 160 Daily Lab. Rep. (BNA) at D-3.

The court below said that "*Giddings* [*& Lewis, Inc.* v. *NLRB*, 675 F.2d 926 (7th Cir. 1982)] in no way casts doubt on the rule that cross-overs returning to their old positions are not permanent replacements." (9a)[15] *Giddings*, however, does not address the question whether crossovers are permanent replacements; it holds that reinstated strikers (*i.e.*, crossovers) as well as permanent replacements, may be recalled in preference to unreinstated strikers with greater seniority if those crossovers are furloughed before the more senior strikers have been

15 If that "rule" was announced by *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), it is—as the dissent points out (471 F.2d at 700)—contrary to the use of the term "permanent replacement" in *Mackay Radio* and *Erie Resistor* to include all "those who worked during the strike," crossovers as well as new hires. In *J.L. Clark*, moreover, a strike settlement agreement required the employer "to reinstate striking employees on a seniority basis." 471 F.2d at 697. Finally, if the question here is whether the crossovers occupied their own jobs or those of the strikers, the Eighth Circuit should have remanded for that factual determination, as the majority did in *J.L. Clark*.

reinstated. If the so called "rule" that the court below announces were correct, the crossovers in *Giddings* could not have remained in their jobs long enough to be furloughed before the more senior strikers were reinstated. The Eighth Circuit's rule would have required the displacement of crossovers by the more senior strikers the moment the strikers requested reinstatement.

The unexpressed but necessarily underlying premise of the court below is that, following an economic strike, employees have a right to exercise the seniority they had under the old contract for limited, specific purposes (which did *not* include return from a strike (22a)) to claim the jobs of employees who chose not to strike. Absent a back-to-work agreement providing therefor, there simply is no such right. It is, moreover, a "settled principle that an economic striker has no statutory right to be recalled by seniority," even when there are vacancies. *Bingham Willamette*, 282 N.L.R.B. No. 165, slip op. at 6 n.5 (1987).[16]

B. Flight Attendants in Training

Apparently recognizing the invalidity of the district court's rationale for holding that the flight attendants in training when the strike ended were not "permanent replacements," the court below expressly declined to adopt the district court's "two-day rule" (14a) and made no mention whatsoever of its "'training school exception' to the *Mackay Radio* rule" (40a). Instead, the Eighth Circuit affirmed the district court on the novel ground that the flight attendants in training were not "employees" within the meaning of the Railway Labor Act. (11-12a) Alternatively, it purported to apply "the rationale of NLRA decisions" and a "balancing test" that it discerned in *Mackay Radio* to conclude that "unreinstated strikers are entitled to

16 *See also, e.g.*, NLRB v. *Wells Fargo Armored Service Corp.*, 597 F.2d 7, 10 (1st Cir. 1979); *Indiana Desk Co.*, 276 N.L.R.B. 1429, 1447 (1985); *Kennedy & Cohen of Georgia, Inc.*, 218 N.L.R.B. 1175, 1175-76 (1975); *Bio-Science Laboratories*, 209 N.L.R.B. 796 (1974).

those positions now held by the . . . trainees" (14a), because the trainees were not permanent replacements.

According to the Eighth Circuit, it is "irrelevant" (12a) that the flight attendants in training had actually been hired by TWA as permanent employees. Nor is it of any import that they were being paid at flight attendant rates of pay, were covered by all employee benefit plans, were accruing flight attendant seniority, were participating in required training at TWA's facility, and were subject to TWA's supervision and direction.[17] Even given all that, the court below said, employees in training are not, "by any stretch of the imagination" (12a), performing services for TWA and, therefore, were not "employees" within the meaning of the Act.

That holding is contrary to the rulings of the National Mediation Board—the agency with the primary jurisdiction to administer and interpret the RLA—that trainees are "employees" under the RLA when, like the flight attendant trainees in this case, they receive the same pay and fringe benefits as other employees in the craft or class, even if they are still in ground

17 The court relied on the inapposite decision of the Seventh Circuit in *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), as "dispositive", saying that the Seventh Circuit "rejected the rationale upon which TWA relies" (10-11a)—while acknowledging that "the circumstances surrounding the pilot trainees in *ALPA* differ from the situation here" (12a), principally in that those pilots were not hired. Since the Seventh Circuit's decision was based on facts precisely opposite to the facts of this case, that court obviously cannot be said to have rejected TWA's rationale.

The court below also ignored that the issue in *ALPA* v. *United*, *supra*, was *not* whether the "Group of 500" were strike replacements who could be retained in the employ of the carrier when the strike ended, but whether they had ever become "employees" entitled to protection under Section 2, Fourth of the RLA (45 U.S.C. § 152, Fourth). As demonstrated at pp. 20-21, *infra*, a replacement who has been offered and accepted permanent employment during a strike need not be an "employee" before the strike ends in order to be a "strike replacement." *See also ALPA* v. *United Air Lines*, 616 F. Supp. 849, 850-51 (N.D. Ill. 1985), amending 614 F. Supp. 1020 (N.D. Ill.), where Judge Bua—emphasizing that the time of commitment of permanence to replacements is controlling — held that another group of 539 pilots, who *were* hired, were permanent replacements even though fewer than half of them had even begun training before the end of the strike.

school training at the time in question. *Scheduled Skyways*, 10 N.M.B. 488 (1983).[18] Thus, concluding that employees in ground school training, even if employed by the carrier in every common sense and common law meaning of the word, "cannot be considered employees within the meaning of the RLA" (12a),[19] the Eighth Circuit eliminated, with a few conclusory paragraphs, the organizational and representational rights of an untold number of employees who have heretofore enjoyed the protections of the Act.

Through its selective use of NLRA authority, the Eighth Circuit also ignored substantial and long standing precedent holding that it is immaterial whether a permanent replacement has completed a required training period before strikers re-

18 *Compare Air Micronesia*, 10 N.M.B. 11 (1982) (holding that trainees who had never been on the payroll of the carrier and had not been offered employment almost two years after completing training were not employees under the RLA).

19 As supportive of its conclusion, the court below blindly stated that "if the trainees were to be considered as employees, they would need to join the Union and pay dues" (12a)—although their training period was only seventeen days and the Act plainly prohibits the compulsory payment of union dues any earlier than "sixty days following the beginning of . . . employment." (45 U.S.C. § 152, Eleventh(a)) Contrary to its implication, moreover, the Eighth Circuit did not address the question whether "trainees," as opposed to other permanent replacements, were required to pay dues, in its decision in the TWA Action. (12a)

Equally spurious is the Eighth Circuit's speculation—without regard to the facts of this case—that "accord[ing] the trainees employee status . . . would allow an employer to amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended." (13a) It is undisputed in this case (i) that TWA ceased recruiting strike replacements on April 25, 1986—over three weeks before IFFA decided to end its strike; (ii) that TWA was required to hire and train the flight attendants in question beginning in late April and early May—while IFFA was still on strike—in order to have a full complement of flight attendants by peak season in June; and (iii) that there were nearly 200 vacancies in the flight attendant workforce at the end of the strike—to which full-term strikers were reinstated. Clearly, there is no basis in this record for any inference—especially on a motion for summary judgment—that TWA was "amass[ing] a trainee pool" (13a) in order to defeat the right of strikers to reinstatement.

quest reinstatement.[20] In any event, insofar as it purports to rely on NLRA precedent and not its strained definition of "employee" under the RLA, the decision below conflicts with the decisions of the Second and Seventh Circuits in *H.F. Binch Co.* v. *NLRB*, 456 F.2d 357 (2d Cir. 1972) and *NLRB* v. *Cutting, Inc.*, 701 F.2d 659 (7th Cir. 1983).

The Second and the Seventh Circuits have held that permanent strike replacements are hired when an offer of permanent employment has been made and accepted and, once hired, are not subject to displacement by returning strikers even if the replacements have not actually become employed before the strikers request reinstatement.[21] As Judge Friendly wrote for the Second Circuit in *H.F. Binch Co.*, structuring a test for determining when a permanent replacement has been hired,

> [T]he . . . question of just what circumstances constituted a hiring to fill the place of strikers . . . must be answered in a practical frame . . . . On the one hand, a mere offer, unaccepted when the striker seeks reinstatement, is insufficient to qualify; on the other, actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date . . . . *[A] replacement has been obtained if, but only if, both the employer and the replacement understand that the latter has accepted the vacant position before the replaced striker offered to return to work* . . . . 456 F.2d at 361-62 (emphasis added; citations omitted).

20 *See, e.g., C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1209-10 (1969), *enforced*, 427 F.2d 983 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964); *Bowman Transportation, Inc.*, 142 N.L.R.B. 1093, 1098 (1963); *Anderson, Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958); *The Texas Co.*, 93 N.L.R.B. 1358, 1391 (1951), *review granted on other grounds*, 198 F.2d 540 (9th Cir. 1952); *see also Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983).

21 *See also Home Insulation Service*, 255 N.L.R.B. 311, 312 n.9, *enforced without opinion*, 665 F.2d 352 (5th Cir. 1981) ("striker replacement applicants . . . who have not yet reported for work . . . obtain the status of striker replacements upon their acceptance of offers of permanent employment"); *L. E. M., Inc.*, 198 N.L.R.B. 694, 695 (1972) ("if an employer makes a commitment to an applicant for a striker's job, . . . that hire [is] a legitimate replacement even though the striker requests reinstatement before the replacement actually begins work") (footnote omitted).

Similarly, in *NLRB* v. *Cutting, Inc.*, *supra*, the Seventh Circuit held that strike replacements were "hired" before strikers requested reinstatement because the replacements had been offered and accepted permanent employment before the strike ended. The court so held even though the replacements did not actually become employed until two days following the strikers' offer to return to work and were required to pass a physical examination before they became employed, which the employer was unable to schedule before the strike ended. 701 F.2d at 661-62, 669.

In contrast, the Eighth Circuit has now held that replacements who had not only accepted offers of permanent employment, but were actually employed by TWA—some for as long as two weeks, with three more days to go to complete training—when IFFA ended its strike, were not permanent replacements and, therefore, that unreinstated strikers are entitled to their jobs. (10-14a) At no point, other than by a distortion of this Court's decision in *Mackay Radio* (*see* pp. 23-24, *infra*), did the court below suggest any basis for affording *less* protection against displacement to replacements (like the flight attendants in question here) who accept permanent jobs and begin their employment before the strikers seek reinstatement, than to those who are promised jobs but have not become employed by the end of the strike.

Neither the Eighth Circuit's result-oriented definition of "employee" (11-13a) nor its so-called "balancing test" (13-14a) justifies the displacement of some 400 permanent replacements who were offered, accepted *and entered* employment before the Union decided to end its strike. "Protection of the right to strike [simply] does not require going so far." *H.F. Binch Co.*, 456 F.2d at 362.

III. THE DECISION BELOW DISTORTS *MACKAY RADIO* AND *ERIE RESISTOR* AND APPLIES THAT DISTORTION TO THE RAILWAY LABOR ACT; IT ALSO IGNORES CONTRARY NATIONAL LABOR RELATIONS BOARD PRECEDENT.

The decision below is a total distortion of this Court's determination in *Mackay Radio* of the limitations on an economic striker's right to reinstatement at the end of a strike. This Court said, plainly and unmistakably, in *Mackay Radio*:

> The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. 304 U.S. at 346.

The Court, in other words, said two things: (i) that strikers are entitled to be reinstated only to vacant places; and (ii) that places occupied by those who accepted employment with assurances that their positions were permanent, are not vacancies. *A fortiori*, the Court did not need to say that places occupied by persons who were permanent employees at the time the strike began, either because they never left those places or because they returned to them while the strike was in progress, were not vacancies.

The court below completely ignores the explicit requirement in *Mackay Radio* that a vacancy must exist before there is any right to reinstatement.[22] It ignores, too, that *Mackay Radio* is expressly based upon Section 2(3) in the NLRA, which provides:

> The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not

22 The majority in *International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972), apparently made the same mistake, as the dissent in that case by Judge Pell pointed out.

> obtained any other regular and substantially equivalent employment . . . . 304 U.S. at 345.

Under *Mackay Radio*, even a striker explicitly defined as an employee under the NLRA has no right to reinstatement in the absence of a vacancy. The court below, however, held that a striker under the Railway Labor Act, who is not defined in that Act as an employee, has greater rights, *i.e.*, the right to remove an employee from his job supposedly because they are both union members. Apart from the fact that the Railway Labor Act confers no such right, the decision below contradictorily acknowledges that the "cross-overs have apparently ceased their union memberships except for payment of dues." (8a)

In administering the NLRA, moreover, the National Labor Relations Board has consistently interpreted that Act so as to raise no question about the right of crossovers to remain in their jobs at the conclusion of a strike even though more senior strikers remain unreinstated.[23] In *Randall, Division of Textron, Inc.* v. *NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), for example, neither the Board nor the Eighth Circuit itself raised any question about the right of crossovers to remain in their jobs. In cases like *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), the Board had no problem with the right of crossovers to retain their jobs; what it held to be objectionable was the grant of benefits to crossovers that would persist *after* more senior strikers had returned to their jobs. Just so, this Court in *Erie Resistor* held objectionable the award of "super-seniority" to crossovers and permanent replacements, to be exercised in the future against reinstated strikers, but did not deny the right of the crossovers to keep their jobs without super-seniority.

23 As explained in a recent publication by the Practising Law Institute: "Junior employees who worked through the strike or returned early may continue their employment even if it results in senior economic strikers remaining unreinstated at the end of the strike." M. Hutcheson, *et al.*, *Employer's Guide to Strike Planning and Prevention* 346 (1985).

Equally novel and unprecedented is the Eighth Circuit's use of *Mackay Radio* as an alternative route to the result it reached with respect to the flight attendants in training when the strike ended. The court below misread *Mackay Radio* as authorizing the courts to use a "balancing test" (13a) to determine whether permanent replacements may retain their jobs at the end of the strike—when *Mackay Radio* actually announced a clear rule that permanent replacements need not be displaced to make room for returning economic strikers. 304 U.S. at 345-46. In the fifty years since then, no other court has found in *Mackay Radio* authority to apply the so-called "balancing test" that the court below purported to find there; nor has the National Labor Relations Board.

The court below also concluded that the honoring of assurances of permanence to strike replacements does not constitute a "business justification" for failing to reinstate strikers (14a)—when this Court has held squarely to the contrary. *See, e.g., Belknap, Inc.* v. *Hale*, 463 U.S. 491, 504 n.8 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for his refusal to reinstate strikers.") (citation omitted); *see also NLRB* v. *Brown*, 380 U.S. 278, 292 n.6 (1965) (It is the employer's "prerogative to hire permanent replacements for strikers."); *Harding Glass Industries, Inc.* v. *NLRB*, 672 F.2d 1330, 1338 (10th Cir. 1982) ("If permanent replacements have been hired before strikers make an unconditional offer to return to work, the employer has a legitimate and substantial justification for refusing to reinstate the strikers."); *Giddings & Lewis, Inc.* v. *NLRB*, 675 F.2d 926, 929 (7th Cir. 1982) ("*Mackay* eliminates the need for any case-by-case application of the [business need] test to justify the hiring of permanent replacement workers.").

IV. THE EXTRAORDINARY RELIANCE OF THE COURT BELOW ON MISSTATEMENTS OF LAW AND FACT IS SUCH AN EXTREME DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS AS TO WARRANT SUMMARY REVERSAL BY THIS COURT.

The opinion below on the questions here presented is so dependent upon incontestably erroneous statements of law and fact that if they were deleted from the opinion nothing would remain to support its results. Because those results, moreover, are so contrary to the law established by this Court, other courts of appeals, and the cognizant administrative agencies, the decision below on the issues raised in this petition should be summarily reversed, in accordance with Rule 23.1 of this Court.

1. In perhaps the most incomprehensible and specious aspect of its rationale, the Eighth Circuit bases its decision on the union security clauses that it has previously held continued in effect. Those clauses, which simply required payment of union dues as a condition of continued employment, cannot be treated as a substitute for a back-to-work agreement or as the equivalent of a union rule establishing the right, as among the covered employees, to exercise seniority to displace less senior employees from the jobs they hold.

Seniority, moreover, is not a creature of internal union rules, but of contract between employer and union. The 1981-84 TWA-IFFA contract made no provision for the use of seniority in the way in which the court below directed. The emphasis by the Eighth Circuit on the concept of "union members" "working together under the union security clause" (7-9a) is simply rhetoric and has no foundation in fact, since the union security clause has neither the purpose nor the effect of governing relationships among employees, and it does *not* require them to be union members.[24]

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24 The Eighth Circuit says that "[u]nder the union security clause . . . [of the 1981-84 Agreement] all flight attendants working for TWA were required to be union members. . . ." (4a) Article 24(A), however, specifically

(footnote continued)

2. The Eighth Circuit cites RLA Section 2, Eleventh as "authorizing 'closed shop' agreements" (7a) and, as its "most important[ ]" reason for concluding that the crossovers are subject to displacement, relies upon a so-called "closed shop agreement" between TWA and the Union (7a). It is clear beyond question, however, that such agreements are unlawful under both the RLA and the NLRA[25] and, in any event, that no such provision was contained in the TWA-IFFA agreement.

3. The court below makes the truly remarkable assertion that "new hires cannot be the subject of discrimination based upon union loyalty and activity" (7a n.4)—thereby removing from the protection of RLA Section 2, Third and Fourth (and apparently NLRA Section 8(a)(3) as well) all newly hired employees.

4. The court below says that under this Court's decision in *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95 (1985), "[U]nion members may resign from all obligations except that of paying dues. . . ." (8a) That case, however, does not deal with resignation by union members from obligations, but from *membership* in the union.

5. Persisting in confusing non-members with members, the court proclaims the *non sequitur* that "if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status." (8a) A union *may* fine its "members." And it is clear that even if the *Pattern Makers'* case does not apply to the RLA—and the court below was willing to assume that it did—the record does not establish that there was anything in this Union's constitution that prohibits resignation during a strike; therefore, the question whether this Union may fine the cross-

provided that "[f]or the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee . . . of dues for each calendar month and initiation fees . . . which are uniformly required of members. . . ." (63a)

25 See C. Morris, *The Developing Labor Law* 1362 (1983); R. Gorman, *Basic Text on Labor Law* 641-42 (1976).

overs who resigned their membership[26] before they went back to work does not arise. TWA, moreover, did not "reward" the crossovers with permanent replacement status; it simply allowed them to remain in their jobs.

6. The court said that "the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity." (8a) Nothing that this Court said in *Erie Resistor*, however, or in any other decision, even suggests that it is "discrimination" on the basis of "union activity" for an employer to decline, at the conclusion of a strike, to displace those who worked during the strike in order to create places for returning strikers.[27]

7. While the court below recognizes that what this Court disapproved in *Erie Resistor* was "an award of super-seniority to permanent replacements and cross-overs" and that "TWA has not awarded super-seniority to the employees who worked during the strike" (8a), it nonetheless says that "several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here." (8a) Those concerns were that super-seniority (in the event of future furlough) "offered an inducement to abandon the strike" and "created a long-term division among the work force." (8a) The court below purported to find the same concerns present here. It said that treating the crossovers as permanent replacements "differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long term conflict and division within the work force of those working together under the union security clause." (9a) But TWA did not "differentiate" among employees; the crossovers exercised their right to continue in, or resume their jobs. TWA

26 The Eighth Circuit says that new hires "were not union members when they began work during the strike." (7a n.4) Neither were the cross-overs, since the court itself says that "cross-overs have apparently ceased their union memberships except for payment of dues." (8a)

27 In another egregious distortion of the law, the court below asserts that to allow crossovers to remain in their jobs when the strike ended is akin to awarding them "super-seniority," a proposition that is on its face contrary to the meaning of that term as used in *Erie Resistor*. *See* footnote 10, *supra*.

did not "induce" them to abandon the strike; they had the free choice of whether or not to join the strike or continue supporting it. And, as to long term conflict and division within the work force, it is ludicrous for the court below to suggest that nothing but harmony will prevail between the crossovers and the strikers who take their jobs or between the strikers and the new hires who were permanent replacements for the strikers.

8. Contrary to the statement of the court below, *George Banta Co.* v. *NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), did not say that the "nature of the benefit conferred on cross-overs was irrelevant." (9a) That case disapproved of benefits and discriminatory treatment that would persist *after* all the strikers had returned to work. In that case, moreover, the employer had agreed, in a settlement agreement, to take back all the strikers as though the strike had been an unfair labor practice strike. The *George Banta* case followed *Erie Resistor* in holding that non-strikers may not be afforded preferential treatment that will differentiate them from strikers *after* the strikers have returned to work.

9. Finally, one of the more arcane and disingenuous pronouncements of the court below is its statement that the Seventh Circuit in *Air Line Pilots Ass'n* v. *United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), has "recently approved reliance on [*International Ass'n of Machinists* v. *J.L. Clark Co.*, 471 F.2d 694 (7th Cir. 1972)]." (9a) The Seventh Circuit, at the page indicated, does not even cite to the *J.L. Clark* case. It does say that non-strikers cannot be awarded positions which they did not occupy during the strike, in preference to more senior strikers. The district court in the *United* case had cited *J.L. Clark* in support of that proposition, but there is no claim here that the crossovers did not occupy flight attendant positions during the strike. Contrary to the implication of the court below, the Seventh Circuit did not approve the statement of *J.L. Clark* that a crossover had to fill a position other than his own and, as noted above, the Seventh Circuit in *Giddings*, *supra*, plainly held that crossovers may retain their jobs at the end of a strike as against the claims of unreinstated senior strikers.

CONCLUSION

Lacking any rational or principled basis of support, the decision below is clearly contrary to this Court's decisions in *Mackay Radio* and *Erie Resistor* and to existing precedent and practice of the courts and administrative agencies concerned with the interpretation of the National Labor Relations Act and the Railway Labor Act. If allowed to stand, it will have the effect of massively shifting, for no good reason, the carefully weighted and long established balance of economic and negotiating power between employers and unions—before, during and after a strike—under both labor Acts. It also raises the spectre of potential imposition of retroactive liability for many millions of dollars in back pay simply as a result of the employer's exercise of the heretofore accepted right to leave permanent employees in their jobs when a union calls off an economic strike.

The decision, moreover, purports to be based on the Eighth Circuit's prior ruling that a union security clause survives the term of a Railway Labor Act agreement, although that clause cannot possibly be read as a back-to-work agreement or as conferring post-strike seniority rights. That case, therefore, has no conceivable applicability, whether it was correctly decided or not.

In sum, the decision below demonstrates so compelling a need for the exercise of this Court's power of supervision that it should be summarily reversed, under Sup. Ct. R. 23.1, on the issues presented by this petition. Each day that the decision is allowed to stand, its strange logic and egregious misstatements of the law will work predictable mischief on national labor policy by unsettling principles established by this Court decades ago, injecting new uncertainties into the collective bargaining process and spawning disputes and litigation over questions long viewed as settled. At the very least, this petition should be granted, in order to address the Eighth Circuit's departure from long accepted judicial and administrative application of the National Labor Relations Act and the Railway

Labor Act, purportedly based primarily on its earlier decision which is itself pending review in this Court in No. 86-1650.

Respectfully submitted,

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October 1, 1987

APPENDICES

APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-2197

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Appellee,

v.

TRANS WORLD AIRLINES, INC.,

Appellant.

K. C. INTERNATIONAL AIRPORT, K. C.

No. 86-2319

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Appellant,

v.

TRANS WORLD AIRLINES, INC.,

Appellee.

K. C. INTERNATIONAL AIRPORT, K. C.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Submitted: December 12, 1986

Filed: May 26, 1987

Before LAY, *Chief Judge*, BRIGHT, *Senior Circuit Judge*, and WOLLMAN, *Circuit Judge*.

BRIGHT, *Senior Circuit Judge*.

This appeal by Trans World Airlines, Inc. (TWA) and cross-appeal by the Independent Federation of Flight Attendants (the Union) arise from the district court's judgment determining the relative rights of strikers, new hires, cross-overs and trainees to continued employment and reinstatement following the 1986 strike by TWA flight attendants. The district court granted preference in employment to newly hired strike replacements and union members who crossed the picket lines, thereby preventing reinstatement of full-term strikers with greater seniority to those positions. For the reasons discussed below, we affirm in part and reverse in part. In essence, we grant preference in current employment only to the new hires.

I. BACKGROUND

The Union and TWA entered into a collective bargaining agreement establishing rates of pay, rules and working conditions. During the spring of 1984, the parties served upon each other notices of intended change under section 6 of the Railway Labor Act (RLA), 45 U.S.C. § 156. After extensive negotiations and following the statutory "cooling off" period, the parties were unable to agree on the changes to be made and the Union commenced a strike on March 7, 1986.

Upon commencement of the strike, TWA hired approximately 1270 new flight attendants and told them they were being offered permanent employment. These new hires were assigned seniority as of March 7, 1986. TWA also utilized approximately 1280 cross-over flight attendants (cross-overs) who were credited with their prior length of service plus whatever time they accrued by working during the strike.[1] Also

1 Cross-overs are those flight attendants who worked for TWA and were Union members prior to the strike. Some never went out on strike and others returned to work at various times during the strike. They kept their seniority as accrued prior to March 7, and also accrued additional seniority throughout the strike. At the end of the strike, they maintained their positions and TWA refused to displace them with returning full-term strikers with greater seniority.

during the strike, TWA continued to hire new flight attendants to meet expected demand. TWA advised these trainees that they were TWA employees as of the first day of training.[2] Approximately 463 trainees had not completed their training when the strike ended.

At 10:00 p.m. on May 17, 1986, the Union made an offer to return to work. Notwithstanding this offer, TWA retained its new hires and cross-overs as employees without replacement by any of those attendants who remained on strike for its duration. TWA later recalled striking flight attendants as the need then arose in order of seniority. In addition, TWA placed the 463 trainees into permanent positions when they completed their training, which was after the strike had ended. These trainees received preference in job placement over those flight attendants who had not returned to work for the duration of the strike.

The Union thereupon instituted this action in the district court claiming that TWA discriminatorily and unlawfully denied reinstatement to more than 2000 striking flight attendants after they had ended the strike and had offered to return to work.

In a previous appeal to this court arising out of this litigation, TWA challenged the continued viability of those portions of the collective bargaining agreement that were not subject to bargaining and intended change. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 809 F.2d 483 (8th Cir.), *petition for cert. filed*, Apr. 14, 1987 (*TWA* I). Particularly at issue in the prior case was the duration of the agreement as to

2 Flight attendants are not qualified to service flights until they complete a training course and an operational experience flight. Prior to March 7, trainees attended the program on a tuition-paying basis and were not offered employment until after completion of the course. After the strike began, TWA placed the trainees on its payroll as of the first day of their training.

the union security and dues check-off provisions. We held in *TWA* I that the entire bargaining agreement did not expire just because the parties reached an impasse in their bargaining about certain items of compensation, expenses and bidding procedures. *Id.* at 490. This court also decided that the union security and dues check-off provisions of the bargaining agreement remained in effect because these provisions had not been reopened in the prior bargaining sessions. *Id.* at 492. Under the union security clause that had not been reopened, all flight attendants working for TWA were required to be union members and pay union dues in order to continue their employment with TWA.

These appeals challenge the district court's rulings on cross-motions by the Union and TWA for partial summary judgment. The district court held that the flight attendants in training when the strike ended were not permanent strike replacements and must yield their jobs to strikers who returned to work. The court decided that a permanent replacement must actually perform work within a reasonable period of time and that two days was a reasonable period. Because none of the 463 trainees had completed their final training flights within two days after the strike, they did not perform services within a reasonable period of time and could not be considered permanent replacements. TWA appeals this holding in No. 86-2197.

The district court also held that the cross-overs and new hires were entitled to retain their jobs as against the claims of strikers. The Union appeals this holding in No. 86-2319.

We affirm the determination that those flight attendants holding a trainee status at the end of the strike may not be retained over striking employees. We also affirm the district court's ruling that new hires may retain their jobs as against the claims of strikers. We reverse, however, as to cross-overs. They may not retain their positions as against strikers with greater seniority.

II. Discussion

Employees who are not working because of a labor dispute remain "employees" of the employer unless they obtain other work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378

(1967); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). When the labor dispute is economic in nature,[3] however, the employer may hire permanent replacements for strikers in order to continue business operations. *Mackay Radio*, 304 U.S. at 345-46. Once an employer hires permanent replacements, economic strikers are entitled to reinstatement only as vacancies occur. The employer is not required to discharge permanent replacements in order to rehire striking employees. *Id.*

A. *New Hires*

The district court held that the 1220 "new hires" who started work on and after March 7, 1986 were employed as permanent replacements and not as additions to the workforce. The district court reached its conclusion by considering the circumstances in which they were hired. The court noted that although TWA anticipated a need for new attendants regardless of a strike, once the strike began, TWA made clear that it was hiring new flight attendants to replace strikers. The new hires crossed picket lines to receive formal offers of employment and TWA had earlier informed them that if they were hired after a strike, they would be considered permanent replacements for striking employees. The court further held that the replacements' subjective understanding of their employment status was irrelevant, that is, the new hires did not need to know and understand their permanent replacement status.

The Union argues that returning strikers should have preference over new hires because the new hires were merely additions to the workforce. It contends that TWA actively recruited new attendants prior to the strike, informing them that they would be hired whether or not a strike occurred. According to

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3 An economic strike protects wages, hours, or terms and conditions of employment. An unfair labor practice strike protests an employer's commission of unfair labor practices. *George Banta Co. v. NLRB*, 686 F.2d 10, 14 n.5 (D.C. Cir. 1982). For purposes of this lawsuit, the district court assumed, without deciding, that this strike was economic in nature. The question of whether the strike was economic or caused by unfair labor practices is the subject of separate litigation, now pending in the district court.

the Union, the new hires must be considered additions to the workforce, and not strike replacements. The Union also argues that no mutual understanding existed between the new hires and TWA that the new hires were permanent replacements for the strikers. Without a mutual understanding, the Union contends that the new hires cannot legally be deemed permanent replacements.

Although TWA's statements to new hires may have been ambiguous prior to the strike, the undisputed evidence clearly shows that once the strike began, TWA employed the new hires as permanent replacements for the strikers. These applicants were informed prior to the strike that they would be hired as strike replacements. These applicants crossed picket lines, and TWA advised them as to their role as strike replacements once they began to work. Thus, we conclude that the district court correctly determined that the 1220 new hires were employed as permanent replacements and thus were not subject to displacement by returning strikers.

We reject the Union's contention that a mutual understanding must exist between the new employees and TWA that the new hires are in fact permanent replacements. The Union argues that the new hires must have subjectively understood that they were permanent replacements in order to create the necessary mutuality of understanding.

The law, however, does not require mutuality. *NLRB v. Murray Products*, 584 F.2d 934 (9th Cir. 1978), upon which the Union relies, does not require mutual understanding. Rather, *Murray Products* holds that an employer's unilateral and undisclosed decision to designate new employees as permanent replacements is inadequate to actually accord them permanent status. *Id.* at 939. In the present case, TWA clearly communicated its decision to offer permanent employment to the new hires. Accordingly, the new hires are permanent replacements and striking employees may not displace them.

B. *Cross-overs*

The district court held that the approximately 1280 striking employees who "crossed over" and went back to work during the strike were also permanent replacements and not subject to displacement by full-term strikers with greater seniority.

The district court relied upon *Randall, Div. of Textron, Inc. v. NLRB*, 687 F.2d 1240 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), in concluding that TWA could legitimately offer cross-overs permanent replacement status. The district court noted that *Randall* and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), are broadly protective of employees who work during a strike and that the offer of permanency to cross-overs did not discriminate on the basis of union activity.

Upon examination of the applicable law, however, we cannot agree with the district court's assessment. Most importantly, the terms of the bargaining agreement prevent the cross-overs from being considered permanent replacements. In *TWA I*, *supra*, this court decided that those portions of the agreement not opened for bargaining were not terminated at impasse, but remained in effect. 809 F.2d at 492. Accordingly, the union security clause which provides that union membership is a condition of continued employment with TWA remains in effect. *See* 45 U.S.C. § 152, Eleventh (authorizing "closed shop" agreements).

Thus, all cross-overs must retain their union membership. TWA may not discriminate among union members based on the degree of their union activity. Accordingly, TWA may not accord cross-overs permanent replacement status and prevent full-term strikers from displacing cross-overs with less seniority because such action impermissibly discriminates among union members based on the degree of their union activity.[4]

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4 The union security clause also requires that new hires obtain union membership in order to continue employment with TWA. New hires, however, were not union members when they began work during the strike. Thus, new hires cannot be the subject of discrimination based upon union loyalty and activity.

We note that many of the cross-overs attempted to resign from the Union. Assuming, without deciding, that *Pattern Makers' League of North America v. NLRB*, 105 S. Ct. 3064 (1985), applies to cases arising under the RLA,[5] union members may resign from all obligations except that of paying dues and the Union may not fine them for working during a strike. *Id.* at 3071 & n.16. In the present case, cross-overs have apparently ceased their union memberships except for payment of dues. This action only exacerbates the division among union members along lines of union loyalty. Furthermore, if the Union cannot penalize its members for working during a strike, neither may TWA reward those members with permanent replacement status. Accordingly, the cross-overs cannot be granted permanent replacement status because such action discriminates on the basis of union activity.

Our review of the law supports our conclusion that the cross-overs do not acquire the status of permanent replacements. In *NLRB v. Erie Resistor*, the Supreme Court upheld the NLRB's decision that an award of super-seniority to permanent replacements and cross-overs unlawfully discriminated against those who engaged in union activity. 373 U.S. at 231-32. Although TWA has not awarded super-seniority to the employees who worked during the strike, several of the concerns voiced by the Court in *Erie Resistor* are applicable to the status of the cross-overs here.

The Court disapproved of super-seniority because the award operated to the detriment of strikers as compared to non-strikers; it in effect offered an inducement to abandon the strike; and it created a long-term division among the workforce. *Id.* at 231. Although an award of super-seniority brings these concerns into a sharper focus than does the conferring of permanent replacement status to cross-overs,

5 In this context, the RLA's authorization of union shop agreements may be significant. Under the RLA, union members apparently need only pay dues if they so desire. *Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 439 (1984). Whether a union organized under the RLA may fine its members for working during a strike is an open question which we need not decide here.

these concerns are nonetheless present. Awarding the cross-overs permanent replacement status differentiates employees on the basis of their union activity, induces employees to abandon the strike and is likely to create long-term conflict and division within the workforce of those working together under the union security clause.

Cases that have followed *Erie Resistor* are more explicit concerning the treatment of cross-overs. In *George Banta Co. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983), the court stated that the nature of the benefit conferred on cross-overs was irrelevant. *Id.* at 19. Rather, an employer may not divide the workforce into those who engaged in strike activity and those who did not. *Id.*

The Seventh Circuit has held that an employee who abandons the strike and returns to his pre-strike position is not a permanent replacement. *International Ass'n of Machinists & Aerospace Workers v. J. L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972). The district court, however, felt that *J. L. Clark* was probably not good law in light of *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982). We do not agree. *Giddings* held that during a layoff, permanent replacements and reinstated strikers have a right of recall on the basis of seniority over unreinstated strikers. *Id.* at 930. Thus, *Giddings* in no way casts doubt on the rule that cross-overs returning to their old positions are not permanent replacements. Furthermore, the Seventh Circuit has recently approved reliance on *J. L. Clark*. *See Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986), *aff'g*, 614 F. Supp. 1020, 1046 (N.D. Ill. 1985), *cert. denied*, 107 S. Ct. 1605 (1987).

Randall, *supra*, relied on by the district court, does not control the decision in this case. The district court determined that *Randall* implicitly approved the grant of permanency to cross-over employees. At issue in *Randall*, however, was the definition of vacancy, and the court merely upheld the NLRB's decision that the employer's practice of offering "special-rated" jobs to employees already working rather than unreinstated strikers unlawfully discriminated on the basis of union activity because Randall was offering an "additional preference besides permanence." *Id.* at 1246. The status of cross-

over employees as permanent replacements was not an issue in that case. Furthermore, *Randall* arose under the NLRA and the parties were not bound by a closed shop agreement. Thus, we deem *Randall* inapplicable to the present case.

Accordingly, we hold that unreinstated strikers are entitled to displace cross-over employees with lesser seniority.

C. *Trainees*

The district court held that the 463 trainees who had not completed their training at the time the strike ended did not become permanent replacements and thus were subject to displacement by returning strikers. The court primarily relied on *H. F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972). In writing for the *Binch* court, Judge Friendly stated that although a permanent replacement need not actually appear on the job in order to displace a striking employee, the replacement must report within a reasonable period of time. *Id.* at 362. The district court here decided that two days constituted a reasonable time, that is, those trainees who did not complete their operating experience flights within two days of the Union's unconditional offer to return to work could not be considered permanent replacements.

TWA argues that the district court's "2-day rule" is totally without foundation in the law. It contends that trainees need not be fully qualified or actually working in order to be deemed a permanent replacement, relying on *Air Line Pilots Ass'n (ALPA) v. United Air Lines*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part & rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987), and several cases arising under the National Labor Relations Act (NLRA). TWA thus asserts that all persons in training at the time of the Union's offer to return to work on May 17 were permanent replacements and not subject to displacement by returning strikers.

In our view, the Seventh Circuit's decision in *Air Line Pilots Ass'n (ALPA) v. United Air Lines, supra*, is dispositive of this issue. We observe that the district court did not have the benefit of the Seventh Circuit's *ALPA* opinion because it was

published after the district court's decision in this case. On appeal, however, the Seventh Circuit reversed the district court and rejected the rationale upon which TWA relies.

In *ALPA*, the airline hired some 500 pilots to work on the first day of the strike, but the employer required these pilots to undergo training before assuming flight duties.[6] The pilots refused to cross picket lines and United refused to consider them employees, thus making their employment contingent upon crossing the picket lines. The district court had determined that the trainees were entitled to employee status as of the first day of the strike in accordance with the offer by United and acceptance by the student pilots. 614 F. Supp. at 1042. Accordingly, the district court held that these trainee-pilots were protected by the RLA and the airline had unlawfully conditioned their employment on crossing a picket line. *Id.*

On appeal, the Seventh Circuit reversed the district court's determination that the pilot trainees qualified as employees. The Seventh Circuit ruled that an employee as defined by the RLA must be someone who has actually "*performed services for the employer under that employer's supervision.*" 802 F.2d at 913 (emphasis added). The court based its conclusion on the plain and specific language of the RLA, which provides RLA coverage to " 'every air pilot or other person *who performs any work as an employee* or subordinate official of such carrier or carriers, *subject to its or their continuing authority to supervise and direct the manner of rendition of his service.*' " *Id.* at 911 (quoting 45 U.S.C. § 181) (emphasis by the court). Accordingly, the trainees did not receive employee status and the protections of the RLA.

We follow the Seventh Circuit's ruling in *ALPA*.[7] The trainees in question, although hired by TWA, never performed

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6 The pilot trainees in question were already trained pilots at the time of their "employment" with United. The training course familiarized them with United's planes and practices.

7 We note that the positions taken in *ALPA* differ from the present case, that is, the union in *ALPA* argues that the trainees were employees

any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA.

We acknowledge that the circumstances surrounding the pilot trainees in *ALPA* differ from the situation here. Specifically, United expressly told the pilot trainees that they were not employees and they did not receive a salary pursuant to a signed agreement with United. In the present case, the opposite occurred: TWA told the trainees that they were employees and they received a salary.

These differences, however, are irrelevant under the RLA. The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under supervision of the employer. This performance factor is determinative in trainee situations because it is the only requirement that the statute explicitly includes. Thus, clear statutory language supports the conclusion that the trainess are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

This conclusion is further supported by the consequences resulting from the valid closed shop agreement that remains in effect between the parties in this case. The contract provides that union membership is a condition of continued employment with TWA. Thus, if the trainees were to be considered as employees, they would need to join the Union and pay dues. Furthermore, the training school would become a subject open to collective bargaining. None of these consequences occurred or have even been contemplated by the parties. In addition, our previous decision in *TWA* addressed the continuing obligation of Union members to pay dues. This court did not require trainees to pay dues.

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whereas here, the Union argues that the trainees were not employees. The rule applies regardless of which party contends that trainees, not on the job, qualify as employees. The Seventh Circuit's holding is based on an interpretation of statutory language and binds all parties.

Additionally, the history of TWA's training program is instructive. Prior to the strike, trainees were not considered TWA employees by anyone. Only when the strike began did TWA attempt to accord the trainees employee status. TWA's attempt failed because these trainees did not perform services before the strike ended. To conclude otherwise would allow an employer to amass a trainee pool capable of replacing the entire striking workforce at some future date after the strike has ended. Such a result is inconsistent with the RLA's grant of protections to those persons who actually perform services for the employer.

Finally, cases decided under the NRLA also support the rationale that the trainees should not be considered employees. Under the NLRA, employees remain employed and are protected from discharge while they are on strike. 29 U.S.C. § 152(3). *Mackay Radio*, *supra*, recognized an exception to the statute's general rule by holding that an employer may hire replacements for strikers and need not fire the replacements once the strike has ended. 304 U.S. at 345-46. *Mackay Radio* is recognized as an exception to the general rule. *Giddings*, 675 F.2d at 926 (quoting *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980)). Courts have been reluctant to extend the *Mackay Radio* exception. *See, e.g., Erie Resistor*, 373 U.S. at 232; *J. L. Clark*, 471 F.2d at 698.

Whether the trainees can be considered permanent replacements within the *Mackay Radio* exception depends upon the rationale used in *Mackay Radio*. In that case, the Court employed a balancing test that weighed the negative impact of hiring permanent replacements on union activity against the business justification for doing so.

Applying this balancing test to the trainees, the trainees do not obtain the status of permanent replacements. During the strike, TWA's interest in continuing its service required the replacement of strikers. The training of new people to fill strikers' positions was appropriate in fulfilling TWA's interest. People who completed their training during the strike and went to work clearly fit within the *Mackay* exception. They filled positions left open by strikers and permitted TWA to operate more efficiently. Thus the balance tips in favor of TWA.

The balance, however, is different for the trainees who had not completed their training when the strike ended. The strike ended when the Union unconditionally offered to return to work. Thus, TWA could operate with returning strikers. It established no business need to put trainees into working positions because all vacant positions could be filled with returning strikers. Thus, while TWA shows no business justification for employing 463 trainees ahead of regular employees who have ended the strike, TWA's utilization of trainees to prevent Union members from returning to their jobs causes great damage to the Union.

Accordingly, even applying the rationale of NLRA decisions, unreinstated strikers are entitled to those positions now held by the 463 trainees.

Although we do not adopt the district court's two-day rule, the status of the trainees remains the same under our reasoning as under the district court's two-day ruling. No trainee completed his or her training between the end of the strike, May 17, and May 20. The district court's two-day rule is more generous than what we have determined the RLA to allow but the Union has not objected to the district court's ruling. Thus, we conclude that any trainee who had not yet performed services for TWA under its supervision by May 17 is not a permanent replacement.[8]

III. Conclusion

For the reasons stated above, we affirm the district court's order granting employment preference to the new hires and denying such preference to the trainees. We reverse the district court as to the cross-overs. We remand this case and direct the district court to modify its judgment consistent with this opinion. TWA is directed to pay one-half the Union's costs in

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8 After oral argument in this case, TWA filed a Rule 60(b)(3) motion seeking relief from the district court's decision concerning the trainees. TWA contends that the district court relied on facts that were misrepresented to the court.

The district court denied TWA's motion on February 17, 1987, and directed that the motion be forwarded to this court. Today's opinion moots the issue pressed by TWA and we express no further comment on its motion.

pursuing its cross-appeal as well as one-half of the Union's costs incurred in defending TWA's appeal.

A true copy.

Attest:

Clerk, U. S. Court Of Appeals,
Eighth Circuit.

APPENDIX B

Order of the U.S. Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-2197/2319WM

The Independent Federation of Flight Attendants, etc.,
Appellee/Cross-Appellant,

vs.

Trans World Airlines, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court for the Western District of Missouri.

Appellant/Cross-Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Judges John R. Gibson, Fagg and Bowman would have granted the petitions. Judges Ross and Magill did not participate.

Petition for rehearing by the panel is also denied.

August 31, 1987

Order Entered at the Direction of the Court:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

Order of the U.S. Court of Appeals for the Eighth Circuit Granting Stay of Mandate Pending Certiorari Proceedings

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 86-2197/2319WM

The Independent Federation of Flight Attendants, etc.,
Appellee/Cross-Appellant,

vs.

Trans World Airlines, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court for the Western District of Missouri.

The motion of appellant/cross-appellee for stay of mandate is granted, and the mandate of this Court is hereby stayed to and including October 8, 1987. If during that period there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that appellant/cross-appellee has filed a petition for writ of certiorari in that Court, the stay shall continue until final disposition by the Supreme Court.

September 24, 1987

Judge Bright:

Order entered pursuant to your recent directions.

Linda L. Penberthy:eh

cc: Judge Lay
Judge Wollman

APPENDIX D

Memorandum and Order of the U.S. District Court for the Western District of Missouri

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization,

Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff (IFFA), a union representing airline flight attendants employed by defendant (TWA), seeks partial summary judgment ruling the three major controversies presented in Count I of the first amended complaint. TWA has filed a motion seeking partial summary judgment in its favor on the same issues. The motions were argued August 25, 1986, and supplemental affidavits were received by leave of court thereafter.

This is a declaratory judgment action, with a prayer for incidental relief, relating to TWA's failure to reinstate striking flight attendants at the conclusion of a strike, in May 1986. In related litigation IFFA seeks a ruling that the strike was induced by unfair labor practices, in violation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151, et seq. In the alternative,

in this litigation the parties assume the court will conclude after a trial in the companion case that there was a strike over economic issues, beginning March 7, 1986. IFFA asserts that its members, as economic strikers, are entitled to reinstatement over three classes of current flight attendant employees of TWA: (1) some 1220 "new hires," employed in the first few days of the strike, who IFFA contends were permanent additions to the workforce rather than permanent replacements for strikers; (2) "junior crossovers," that is, persons who either worked throughout the strike or returned to work as flight attendants prior to 10:00 p.m. on May 17, 1986, when IFFA's president tendered an offer to return to work (the number who would be displaced would be no more than 1284 crossovers, excluding those crossovers who may have seniority over full-term strikers); and (3) some 463 "trainees" who had begun flight attendant training but had not completed such training on May 17, 1986.

TWA has reinstated fewer than 200 full-term strikers. TWA contends that all of the above categories of workers are entitled to remain on their jobs if, as TWA contends, the strike in question was simply an economic strike. TWA further contends that IFFA did not make an unconditional offer to return to work, as is required before a duty to reemploy strikers occurs.

All parties seek prompt resolution of these questions and have been cooperative in stipulating to pertinent facts and in supplementing such agreed facts with affidavits rather than engaging in contentious discovery. The court relies on a major stipulation filed July 21, 1986, and has received supplemental affidavits from affiants Frankovich (August 22), Peltzman and Laursen (August 25), Hoar (August 29), Chimenti (September 8), as well as large collections of affidavits filed by TWA on August 12 and by IFFA on September 2 and 3. I conclude that there are no controversies regarding pertinent facts that would preclude summary judgment. Facts necessary to ruling will be recited in connection with the analysis of the union's three basic claims and the "conditional offer" defense. That general defense will be rejected, for reasons set forth below. TWA is entitled to prevail, in my opinion, on two of the three substan-

tive controversies, and IFFA is entitled to prevail on one of them (the "trainee" issue).

I—"Unconditional Offer" To return To Work

Before an employer is required to reinstate economic strikers, and to desist from employing new hires, the parties agree the law requires that the economic strikers must make an unconditional offer to return to work. IFFA contends this occurred at 10:00 p.m. on May 17, 1986, when its president, Frankovich, delivered to a TWA official, Hoar, a written statement offering on behalf of the strikers to abandon the strike and return to work. TWA contends there were certain qualifications and conditions unresolved. In any event, TWA began implementing a reinstatement plan, pursuant to Hoar's letter to Frankovich on May 23, 1986. TWA asserts there was a reservation of rights in Hoar's letter.

On its face, the May 17 letter (Stip. Exh. 5) is an unconditional offer, though coupled with an assertion that the IFFA strikers have a right to reinstatement as unfair labor practice strikers. Hoar correctly describes it as an offer "on behalf of all the strikers, to return to work immediately." Hoar Aff. August 29, 1986. At various times during the next few days, TWA raised questions about (1) whether IFFA was demanding return in seniority order, (2) whether IFFA might resume striking if its members rejected TWA's latest settlement proposal, and (3) whether picketing and in particular notices that a strike was in progress were inconsistent with the offer to return.

On Sunday, May 18, Frankovich delivered a "clarifying" letter (Stip. Exh. 6) offering to return the employees in seniority order and asserting a legal duty to reinstate employees in that order but stating, "Lest there be any misunderstanding, IFFA's unconditional offer is made independent of and irrespective of the outcome of the membership ratification vote on TWA's latest proposal. Moreover, employees will return to work as directed by the Company." It was further asserted that

TWA acts "at its peril" legally if reinstatements were made out of seniority order. While TWA asserts this letter is ambiguous, I believe it reaffirms the unambiguous offer of May 17 and is itself fully consistent with an unconditional offer to return to work.

Frankovich further recites, in an uncontested portion of her affidavit (Frankovich Aff. August 22, 1986), that she gave immediate instructions on May 17 to stop picketing with strike notices. She did not agree to refrain from informational activities publicizing the continuing dispute with TWA. All this seems legally proper, and the fact that some strike notices were displayed in New York prior to TWA's consent to reinstate strikers was apparently inadvertent and not inconsistent with an unconditional offer to return to work. At that point the unreinstated workers were in fact "on strike" involuntarily.

The Hoar letter of May 23 (attached to Hoar Aff. August 29, 1986) continues to protest the alleged lack of an unconditional offer to return to work, and may thus be said to contain a reservation of rights, as TWA contends. As stated above, however, I conclude the offer to return was unconditional, and created a duty to reinstate economic strikers in vacancies as they develop in the flight attendant workforce.[1]

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1 The letter has some significance, however, in appraising the respective rights of striking flight attendants and trainees who had been given the title but not the work of a flight attendant prior to the end of the strike. Hoar states he is freezing "our active permanent Flight Attendant work force" and that strikers will be placed on a preferential rehire list "from which they shall be rehired for active service if immediately available for such service to fill vacancies in order of seniority . . ." This wording distinguishes between active service flight attendants and other employees (such as strikers and trainees) who bear that title. It seems to be a commitment not to place trainees in "active service" vacancies after May 23. It appears, however, that trainees were placed as "active flight attendants" ahead of strikers, "beginning the last week of May." Stip. ¶ 24. To the extent that TWA had previously promised trainees they would not be required to yield to strikers, TWA seems to have given two conflicting commitments.

II—CROSSOVERS

At the conclusion of argument of the summary judgment motions I stated from the bench a conclusion that "junior crossovers" are entitled to retain their positions at the end of an economic strike, and cannot be displaced by the exercise of "bumping" rights of full-terms strikers who may enjoy seniority.

The contract between IFFA and TWA, which I have ruled (in other litigation) still exists, does not authorize the exercise of seniority rights to obtain reinstatement after a strike. It does authorize use of seniority to obtain reinstatement after layoffs, but that is a different situation. IFFA argues, however, that labor law principles establish a right to reinstatement, except as to new hires employed during the strike as permanent replacements for strikers.

It is not necessary to recite the law generally applicable to the right to reinstatement following an economic strike. A brief overview of the development of the applicable law, under the National Labor Relations Act, appears in the Eighth Circuit opinion of Judge Arnold in *Randall, Division of Textron, Inc. v. NLRB*, 687 F.2d 1240, 1244 (8th Cir. 1982), (cert. den. 461 U.S. 914 (1983)). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), the Court struck down an employer's plan to grant twenty years' "superseniority" to persons permanently employed during a strike, but stated that "an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers." 373 U.S. at 232. This language from *Erie Resistor* would protect crossovers as well as new hires from being displaced after a strike.

The *Randall* case contains a similar broad statement of the general rule. Although holding that Randall had violated the law by giving a form of "superseniority," the court's criticism was that Randall had given "additional preference besides permanence to those who remained at work as opposed to those who struck . . ." 687 F.2d at 1246. It is quite clear that the Eighth Circuit had no criticism of simply giving "permanence" to those who remained at work. It is equally clear that the court knew it was dealing with a situation involving crossovers as well as new hires.

In the *Randall* case, as recited by the Court of Appeals, one production worker remained with the employer throughout the strike and a "steady stream of individual strikers" signed up for work during the strike. Crossovers were then accepted back on the job in preference to hiring permanent replacements. Although six unfair labor practice charges were sustained by the Administrative Law Judge, there was no finding of unlawful discrimination in the retention of crossovers over full-term strikers who may have had seniority. Such favored treatment may not even have been challenged. When Judge Arnold implied that "permanence" of tenure alone would not be objectionable, if no additional preference were given to "those who remained at work," the Eighth Circuit thereby gave implicit sanction to the conduct of which IFFA now complains.

IFFA relies on two cases from other circuits, however, and in addition contends that the Railway Labor Act should be interpreted to give greater protection for strikers than is conferred by the National Labor Relations Act.

IFFA cites *George Banta Co., Inc. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982). It is not clear that *Banta* dealt with unreinstated strikers, at least when the case reached the court of appeals. Even if some of the remarks of the court may be favorable to the IFFA contention, no reason was suggested for differentiating between new hires and crossovers. The right to retain permanent new hires was said to be "one significant exception" to the right of reinstatement of economic strikers (686 F.2d at 20) but the court did not explain, and perhaps had no occasion to explain, why the protection of new hires should not apply equally to crossovers who may lack seniority.

The other case principally relied on by IFFA is *IAM v. J.L. Clark Company*, 471 F.2d 694 (7th Cir. 1972). In that case two judges on the panel held that a crossover who lacks seniority may be "bumped" by a returning striker having greater seniority, if the crossover has not changed his work during the strike and replaced the striker in his old job. No authority or reason

for such right of reinstatement was given, other than that Supreme Court decisions have only given protection to permanent replacements. The dissent, by Judge Pell, observed that Supreme Court decisions give "no indication that the strikers who returned to work during the strike were any less protected than the new employees . . ." 471 F.2d at 700. Judge Pell saw no reason to give special preference to new hires, as against crossovers, and no reason has been suggested by IFFA in this case or is developed in any of the other authorities reviewed by the court.

It would seem that employers faced with a strike would have at least as great a practical need for employing crossovers as new hires, if crossovers can be induced to return to work. The inducement of permanent rather than temporary employment is deemed presumptively needed to attract new hires, according to the Court in the landmark decision of *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Inducement of similar attractiveness would seem normally required to retain old employees during a strike, or to attract them back.[2] It is surely as difficult psychologically for old employees to abandon their coworkers and cross a picket line as it is for new hires to take such action. If *Mackay Radio* is sound (and I recognize that some academic critics advocate disabling employers from hiring permanent replacements for strikers) the same principles would seem to apply to protect crossovers.

TWA cites one decision in the Sixth Circuit that indicates that strikers have no right to "bump" crossovers, if post-strike

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2 IFFA's briefing tacitly concedes that TWA made a commitment to its crossovers that they could retain their jobs after the strike. One specific "guarantee" against replacement was made on March 17, 1986. Exh. 22 to Borden affidavit filed August 12, 1986. Even as to crossovers employed during the first ten days of the strike, this commitment seems effective as a guarantee of "permanence." Cf. *NLRB v. Murray Products, Inc.*, 584 F.2d 934, 939 (9th Cir. 1978) (belated decision to offer permanence not effective where not communicated). At least one prestrike communication seems to promise prospective crossovers that they will not be replaced by strikers. Exh. 13 to Borden Aff. of August 12, 1986.

work of the employer is insufficient to keep all employed. *NLRB v. Harrison Ready Mix Concrete*, 770 F.2d 78 (6th Cir. 1985). Additional cases from the Seventh Circuit, such as *Giddings & Lewis v. NLRB*, 675 F.2d 926 (7th Cir. 1982), make questionable whether *J.L. Clark* would still be followed by that court.

The language of the courts in *Erie Resistor* and *Randall* is broadly protective of the rights of all persons who work during a strike. The breadth of that language seems fully justified in principle and will be followed in this decision.

IFFA's final argument for its contention that strikers should have the right to displace crossovers is that the court should disregard the NLRA precedents in favor of the allegedly greater protection given employees under the Railway Labor Act. This contention, which was emphasized at oral argument, is wholly lacking in support in the cases. On the contrary, the Second Circuit has recently noted that the Railway Labor Act explicitly protects only "organizing and representational rights, as opposed to the broader 'concerted activity' rights under the Wagner Act." *IUFA v. Pan American World Airways*, 789 F.2d 139, 141 n.2 (2d Cir. 1986). The only suggestion that employees may have greater rights under the Railway Labor Act is contained in rulings where express restrictions in the NLRA do not appear in the RLA. *E.g.*, *BRT v. Jacksonville Term. Co.*, 394 U.S. 369 (1971). In the present context it seems desirable to draw on NLRA experience rather than to create novel principles applicable only in the Railway Labor Act context. A few courts have so ruled, when considering reinstatement rights of airline strikers. *National Airlines, Inc. v. IAM*, 416 F.2d 998, 1006 (5th Cir. 1969); *ALPA v. United Airlines*, 614 F.Supp. 1020 (N.D.Ill. 1985).

On the assumption that the IFFA strike that began March 7 was an economic strike, it is therefore concluded that none of the 1284 crossovers are subject to being displaced by more senior unreinstated strikers.

III—New Hires

Treating the new hires who came to work on and after March 7, 1986, as permanent flight attendants, IFFA nonetheless contends that their employment cannot block the return of full-term strikers to the payroll because it characterizes the new hires as permanent *additions* to the workforce rather than as replacements for strikers. IFFA relies on a pre-strike notice by TWA to prospective flight attendants (Stip. Exh. 9) that promised them employment if they came to the TWA premises on March 7 to receive a formal offer of employment, regardless of whether there was a strike on that date.[3]

TWA explains by affidavit (Borden Aff. August 12, 1986) that its planners anticipated a need for the new flight attendants in any event. If there were a strike, TWA would need replacements for strikers. If there were no strike, TWA expected that large numbers of its flight attendants would promptly elect to take early retirement on favorable terms that would be appealing to those who chose not to remain at work at reduced salaries. TWA contends that the occurrence of the strike on March 7 eliminated the special early retirement offer and the prospect that flight attendants might need to fill the jobs of retirees. Thus, TWA asserts, the alternative of being strike replacements was the eventuality that was ultimately realized.

TWA's factual contention seems the only realistic, practical way of looking at what occurred. The new hires went through picket lines to receive the formal offers of employment. Affidavits have been filed by the TWA personnel charged with processing new hires stating that groups of new hires were lectured about their role as strike replacements on March 7 and the next few days, when the persons in question assumed their positions. While it is not established by affidavit that the term "strike replacements" was regularly or frequently used in

3 IFFA's initial briefing contends that the notice itself is dispositive of the entire issue. It is difficult to understand that contention because the notice expressly referred to the possibility that the new hires might be needed for strike duty.

describing the function of the new hires, it can hardly have escaped their attention that a strike was in progress, that TWA's flight attendants were for the most part on strike, and that they as newly hired flight attendants were replacing the strikers.

IFFA responds with affidavits from a number of former employees hired on March 7 and the subsequent days denying that the term "strike replacements" was used in explaining their role. They uniformly deny they understood they were being asked to serve as strike replacements. Some of the affidavits state, however, that the affiants were told they would be required to cross picket lines if they wanted to retain their jobs and that jobs would be immediately available if there were a strike, but work would not be immediately available otherwise. Taylor Aff. of September 3, Martoia Aff. of September 2, Speere and Alexander drafts of affidavits of September 2 (usable as admissions by IFFA). IFFA contends that mere subjective theories of an employer do not create a status, citing a case where temporary employees were not treated as permanent replacements in the absence of evidence that the employer's description of their status was expressed to the employees. *NLRB v. Murray Products, Inc.*, *supra*. While the case so holds, in considering the issue of "permanence," a matter of contract, I doubt that mutual understanding or formal notice is required on the issue of whether an employee is a strike replacement. That may be treated as a matter of fact, depending on how the employee was actually used.

It remains clear, however, even considering the IFFA affidavits, that under the circumstances of a strike the new hires had been at least twice advised in writing that they would be strike replacements if employed as new hires after a strike began. Mr. Borden's written statements to that effect, dated November 22, 1985, and February 10, 1986, were distributed to Travel College graduates and students. Borden Aff. ¶¶ 32, 40, referring to Borden Exhibits 8 and 11 (filed August 12, 1986). The only reasonable understanding beginning March 7 was that the new hires were being employed for permanent jobs, with initial service that may be legalistically referred to as "strike replace-

ment" or more commonly termed strikebreaking. This is doubtless the way IFFA described the work at the time, and the description seems accurate. In the derogatory term of the labor movement, the new hires were "scabs."[4]

It is not necessary for this decision to weigh the credibility of some of the affidavits, particularly the denial that the affiants "understood" they were being offered work as strike replacements. I believe the term as used in *Mackay Radio* is indistinguishable from strikebreaking, and the facts here speak for themselves. It is possible, however, it was used in the affidavits in a post-strike sense; that is, that the affiants may have thought the new hires could continue working (as promised) and that the returning strikers would *also* have jobs. In that sense, the affiants may have been stating that they did not believe they were being employed to permanently replace strikers but would become additions to the workforce. This may have been somewhat unrealistic, but it may fairly be treated as a credible assertion of subjective belief and I so construe it.

Nothing in *Mackay Radio* requires, however, that strikebreakers who have been offered permanent jobs be told that the employer anticipates the permanent displacement of the economic strikers. Such displacement is permissible under that decision depending on economic needs of the employer after the strike.

The only case purportedly contrary to this view is *Murray Products*, *supra*, where one employee was referred to as an addition to the workforce whose employment could not be used as a bar to reinstating a returning striker. While the Ninth Circuit may have been a bit generous in ruling that case involving the status of a single employee, it was simply accept-

4 It seems immaterial for present purposes that TWA may have somewhat overemphasized the prospects for employment without a strike or that some officials may have denied that it was simply operating a school for "scabs." The alternative of using the pre-strike trainees as strike replacements was expressed in writing, distributed to the trainees by TWA. Borden Aff. ¶¶ 32, 40.

ing a finding that a new hire was told unconditionally that he was taking a "new position." That did not happen here. I do not believe *Mackay Radio* would permit a ruling that large numbers of strikers must be reinstated, regardless of TWA's economic needs, simply because some of those who replaced them during the strike and were promised permanent jobs had a confused notion that there would be room for everyone after the strike.[5]

For the foregoing reasons, I conclude that the new hires employed on and shortly after March 7, 1986, cannot be displaced by returning economic strikers. Moreover, such persons should not be categorized as additions to the flight attendant workforce whose employment would not block the return of economic strikers. The new hires during the strike were employed as strikebreakers, sometimes called permanent replacements, and had been so notified.

IV—TRAINEES

TWA contends that 463 persons who were still trainees on the date the strike ended may be treated as permanent replacements as flight attendants because they were on TWA's payroll as flight attendants from the time of entry in training school, and were paid as flight attendants. It cites cases holding that persons in training are not precluded from being considered replacements for fully trained strikers. Other authorities hold that promises of employment may be honored after a strike, at least when the belated arrival of the employee on the job occurs within a reasonable time after the strike ends. At the

5 If the law were to the contrary, it would apparently be necessary to try the individual situations and understandings of more than 1000 current employees (none of whom has filed an affidavit) to ascertain whether they thought they were permanently displacing strikers or would be treated as additions to the workforce after the strike. Given the delay and uncertainty posed by such an issue, the parties may be fortunate that I do not believe *Mackay Radio* requires anything other than the offering of permanent positions to new hires being used as strikebreakers.

beginning of the strike, however, presumably with legal counsel, TWA informed an earlier group of trainees that the law provided them with assurance of permanent jobs "if you're hired and working as a Flight Attendant." Stip. Exh. 12. TWA statements on March 28 and April 15 likewise offered permanent status to "working flight attendants." Exhibits 24 and 25 to Borden Affidavit of August 12, 1986.

A decision which is most helpful to the ruling of this issue is Judge Friendly's opinion in *H. F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972). In that case the question was whether replacements had occurred before the end of a strike at 2:00 p.m. on March 16, 1968. On that day the mother of one replacement purported to accept the employer's job offer for him, and the employer made a record entry of employment, but the replacement did not appear on the job for processing of application papers until three days later. Another purported replacement had indicated a desire for regular employment before the strike ended and a record entry had also been made by the employer showing that she had replaced a striker. The court ruled that strikers had not been effectively replaced in either instance. Two other employees who had transferred to strikers' jobs and were "actually at work" when the strike ended were held to have displaced strikers.

The court ruled that determination of the question of "just what circumstances constituted a hiring to fill the place of strikers . . . must be answered in a practical frame." 456 F.2d at 361. Although the court drew a protective line in that case around employees who were actually at work when the strike ended, Judge Friendly stated that "actual arrival on the job should not be required if an understanding has been reached that this will occur at a reasonably early date." 456 F.2d at 362. If the hiring process had proceeded so far that the replacement "would have reasonable 'grounds for indignation' if he were subsequently denied the promised job" Judge Friendly was prepared to accept the replacement as effective. More than an employer's promise is required, under the Friendly test, however; there must, in addition, be an expectation that arrival on the job will occur "at a reasonably early date."

The three day delay in availability in one instance in *Binch* apparently made ruling against that purported replacement comparatively easy. Under the *Binch* decision, it would not seem that a striker must wait around for a replacement who is not essentially ready for work. While an unseemly race is not required, very prompt availability seems necessary. One can conceive of a situation where a replacement might fairly be allowed several days, if in transit to a distant job, for example. But arrival at a "reasonably early date" should not require a returning striker to stand idly by and watch a job disappear during a substantial or unjustified waiting period.

In the present case, TWA has available a series of arguments. One is that the trainees in question had been upgraded in company records to flight attendants and were being paid as flight attendants, so they should be deemed to be flight attendants for purposes of displacing strikers, regardless of their total lack of on-the-job experience. A second theory is that at least some of the trainees were ready for work within a very few days of May 17. Finally, the necessity of a training period is at least arguably consistent with the requirement of arrival at a "reasonably early date," when all the trainees were placed within a six week period.

The Peltzman affidavit, filed August 25, shows that all but five of the trainees completed their training and were placed on "operating experience" flights beginning May 20 and ending June 3. They performed flight attendants' duties, under supervision, on "revenue flights" originating in St. Louis. Placement occurred every day, including Saturdays and Sundays. There was, however, a break between the evening of May 17 (when Frankovich made IFFA's offer to return to work) and the first operating experience flight for 18 trainees on May 20. We are not informed when the trainees began their regular, unsupervised duties at an assigned domicile. But it may be sound, using NLRA precedents, to count on-the-job training as a basis for replacing strikers. The Peltzman affidavit is, therefore, usable proof.

What should be treated as a "reasonable time," however, under these circumstances? If the month of May were used to protect replacement rights, most of the trainees would prevail, but 71 would be deemed tardy. If trainees were deemed to be required to begin their operating experience flights within five days of the strikers' offer to return to work, however, 80 would prevail, but the bulk of the trainees would be considered too late. If a two-day rule were used, none of the trainees would win.

The two-day rule seems most consistent with Judge Friendly's concept in the *Binch* case. It has the additional advantage of using the only period in the record where there was an appreciable break in the process. It would appear that word of the Frankovich offer was very promptly circulated, and enabled TWA to call a halt to its operating experience flights on Sunday, May 18, and on Monday, May 19. The resumption of such flights on May 20 suggests a reconsideration by TWA, and adoption of a "hard line" favoring replacement of strikers. That apparent change in tactics may be fairly treated as untimely. If TWA was reasonably able to stop the trainees from going through their final training period, it was obligated to do so, in order that its conflicting legal duty to returning strikers could be honored.[6]

One must reject the theory that a mere job title and rate of compensation should be deemed to establish status as a flight attendant, sufficient to withstand the claims of returning strikers. A trainee who has never served as a flight attendant (even as an apprentice under supervision) should not be given priority of rights, if the questions presented are to be answered "in a practical frame," as Judge Friendly suggests.

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6 As previously discussed in footnote 1, moreover, on May 23 TWA told returning strikers that they would have prior rights to vacancies in "active service." In violation of this commitment, TWA apparently began to place trainees in active service on and after May 24, 1986. It is unlikely that *Mackay Radio* protects commitments to replacements when an employer has also made conflicting commitments to returning strikers.

Allowing TWA to continue training replacements for weeks after the strike had ended, and giving such trainees priority over returning strikers, does not seem to satisfy the *Binch* rule that on-the-job service must begin at a "reasonably early date" after commitments have been made. I must respectfully disagree with what seems to be a contrary ruling by Judge Bua, therefore, when he allowed displacement of striking pilots with new hires, after the conclusion of a pilots' strike, even though the employer necessarily deferred actual assignments of such new hires until their completion of a training program. *ALPA v. United Air Lines, Inc.*, 616 F.Supp. 849, 851 (E.D.Ill. 1985). For reasons I shall discuss further, this seems an unsound loosening of the *Binch* test, which was cited by Judge Bua as the controlling general principle.[7]

It would distinctly expand the *Mackay Radio* principle if permanent replacements were to include not only persons who begin working during the strike or immediately thereafter but also persons who are simply in training at some other site. The expansion seems unwarranted. *Mackay Radio* was designed to meet a perceived need by employers to offer permanent jobs to strike replacements; otherwise, it is presumed, it will be extremely difficult to recruit persons who will replace strikers, most typically by going through a hostile picket line set up by persons endangered by the prospective loss of a job. Merely attending a training school typically presents an easier situation. While strikers may be expected to bombard trainees with propaganda, the imminent danger of truly hostile words and conduct would not seem as likely. Therefore, unlike the *Mackay Radio* situation, a pressing need to offer permanent positions to trainees should not be presumed.

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7 The *ALPA* case is on appeal, and has been argued. The briefing suggests that for tactical purposes or otherwise the union is seeking an "all or nothing" ruling. The entire group of unreinstated pilots seeks reinstatement on the theory there was an unfair labor practice committed; little if any effort was made on appeal, and perhaps not before the district court, to replace the late trainees as a separate group.

In the present case, I am aware of contentions by TWA that there was hostility expressed by IFFA picketers at the training school and that TWA felt a business need to offer the trainees permanent jobs. Henderson Aff. August 12, 1986, ¶¶ 29, 42, 44, 56. The degree of hositility has not been shown to approach that directed toward employees on active service, however, where there were documented reports of obscene telephone calls, verbal threats of bodily harm and physical assaults. Borden Aff. ¶¶ 88, 89. Mr. Henderson seems simply to be reporting his own impressions, without offering any basis for making comparisons with what was occurring at the airports.

A TWA management official may well have sensed hostility at the picket line that was no problem for trainees. No complaints from trainees have been disclosed, and no affidavits filed. While the question may be close, I do not believe the Henderson affidavit suffices to justify an enlargement of *Mackay Radio*. A better appraisal might be made after a hearing, but it seems desirable to rule as a matter of law, rather than create factual issues that must be fully litigated in each case before management or labor will be able to know their rights in a training school context. The Henderson affidavit, moreover, is so conclusory, lacking in details and explanations, that a ruling of insufficiency of evidence as a matter of law would probably be justified at trial, given the substantial demonstration of business necessity that I believe is required. If so, summary judgment is authorized. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). The "sketchy beginning" of a contention is no bar to summary judgment. *Brown v. Trans World Airlines, Inc.*, 569 F.Supp. 247, 255 (W.D.Mo. 1983), *aff'd*. 746 F.2d 1354 (8th Cir. 1984).

The training school experience was not so onerous as to cause TWA to dispense with charging trainees $2500 for the right to participate in the training program. It would seem that the rights of economic strikers, earned as employees after years of service, should have sufficient legal status so that TWA should at least have experimented with a reduction in or relinquishment of the tuition charge before offering trainees

permanent employment rights, at the expense of the strikers. When people are willing to pay to cross a training school picket line, there can hardly be said to be an obvious business necessity to offer them guarantees of permanent jobs while they are in school.[8]

It is therefore determined, accepting the materials submitted by TWA that the 463 trainees who had engaged in no operating experience flights prior to May 20, 1986, and were apparently not assigned to working positions until at least May 24, 1986, were not properly retained as TWA flight attendants in preference to returning strikers. TWA will be required to reinstate returning strikers displaced by such trainees, with back pay.

CONCLUSION

It is therefore ORDERED that partial summary judgment be entered in favor of TWA on IFFA's claims in Count I for reinstatement of economic strikers displaced by crossovers and new hires who worked during the strike, and that partial summary judgment be entered in favor of IFFA on its claim for reinstatement of economic strikers displaced by trainees who did not have operating experience flights prior to May 20, 1986, and were not assigned to active service as regular flight attendants on revenue flights prior to May 24, 1986.

Economic strikers with enough seniority to have been reinstated if the 463 trainees had been displaced instead of given positions in active service shall be reinstated within 30 days, absent a stay pending appeal. Back pay with interest, less interim earnings, shall be promptly paid such reinstated strikers. In all other respects, IFFA's claim for injunctive relief is DENIED. SO ORDERED.

---

8 The present ruling does not, of course, deal with the question of whether former trainees now serving as flight attendants may have some claims against TWA for displacing them with former strikers, under court order. Conceivably they may have rights under state law for return of their tuition fees or other remedies. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983).

The court retains jurisdiction to modify or enforce this order. A motion for stay of relief granted pending appeal will be considered by this court, given the closeness of the legal questions and the considerable dislocation caused by this ruling if there is a reversal.

/s/

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: Sept. 9, 1986.

APPENDIX E

Order of the U.S. District Court for the Western District of Missouri Granting Stay Pending Appeal

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
an Unincorporated Labor Organization,
Plaintiff,

v.

TRANS WORLD AIRLINES, INC.,
Defendant.

ORDER GRANTING STAY PENDING APPEAL

On September 9, 1986, judgment was entered on cross motions for summary judgment, altering the status quo in one material respect. TWA was directed to re-employ some 400 full term strikers who had not been reinstated at the end of the strike because some 400 trainees were retained in TWA's employ and thereafter given flight attendant positions on commercial flights. The strikers to be reinstated under my ruling apparently have a minimum of some 20 years seniority as flight attendants.

In order to avoid a precipitous and disorderly change in airline personnel, the order was to be given effect within 30 days. Thereafter, in order to deal with pending motions, the effective date was advanced to the end of October 1986. TWA has appealed and now seeks a stay pending appeal.

The initial ruling noted the possibility of a stay, based on "the closeness of the legal questions and the considerable dislocation caused by this ruling if there is a reversal." Subsequent filings and further study reinforce my inclination toward granting a stay. While I recognize that in some instances dire hardship may be caused by a further delay in reinstatement, all factors to be considered make a stay appropriate.

The balancing of interests in this context is much like that involved in considering an application for a preliminary injunction. 7 *Moore's Federal Practice* (Second Ed.) 62-26. The major difference is that the party seeking a stay has lost at the trial court level. When further litigation is clearly justified, however, as where the likelihood of ultimate success remains close to 50-50, it seems fair to treat the trial court decision as simply one round in an ongoing battle, and to view the questions as involving the right to relief "pending litigation." In such a situation preservation of the status quo that existed before the immediate controversy is one of the strongest grounds for urging judicial action or inaction.[1]

In this case the 400-odd full term strikers were not in TWA's active employ but the 400-odd trainees were on the payroll when this controversy developed. That status continued without interim relief for almost four months of litigation in this court. A further delay of some six weeks is occurring while the parties ready themselves for the appeal. While appellate docket control is of course entirely a matter for the court of appeals it

1 Many opinions refer to the preservation of the staus quo as the primary function of equitable relief pending litigation. *E.g.*, *Ferry-Morse Seed Co. v. Food Corn*, 729 F.2d 589 (8th Cir. 1984); *Land-O-Nod Co. v. Bassett Furniture Ind.*, 708 F.2d 1338 (8th Cir. 1983) (dissenting opinion); *Morgan v. Fletcher*, 518 F.2d 238 (8th Cir. 1975). While exceptional circumstances may justify an order changing the status quo before judicial review has become essentially final, I believe that large-scale, disruptive changes pending litigation are seldom ordered. A trial court decision may be considered to have finality for these purposes if, unlike the case at bar, the chances of reversal on appeal are deemed minimal. The situation would be quite different, for example, if I believed the chances were two or three to one that there would be an affirmance on TWA's appeal.

may be proper to express the hope that TWA's motion to expedite will be granted, as it was in the companion case involving dues obligations, an issue that is, at least superficially, less important to the persons affected. For purposes of this ruling I will assume that a decision on appeal can be handed down quite early in 1987. If not, the issue of continuing the stay may need further consideration at the appellate level.[2]

Denying a stay would necessarily cause termination of employment of the recent trainees because they have less seniority, under my ruling, than any of the full term strikers. The comparative hardship cannot be readily assessed. Doubtless some of the former trainees were in desperate need of jobs when they were hired, and would have appealing stories to relate if affidavits were collected. It may be engaging in stereotyping to say that the former trainees as a group would be less likely to suffer hardship from unemployment than will the senior full-term strikers as a group. Even if I accepted such a stereotype, however, reinstatement of senior employees would also cause personal and family dislocations throughout the flight attendant body employed by TWA. That would somewhat even the scales. More disheartening would be the prospect of double dislocation caused by a reinstatement in November, and a possible reversal in January or February, for example.[3]

The chances for reversal must be candidly considered. Developments since September 9 have somewhat reduced my concern that the court of appeals might decide that summary judgment (one way or the other) was premature. The post-decision affidavits by TWA relate to events in late April. They could not have been the basis for TWA's decision, apparently in

2 An alternative might be to require, as a condition of stay, subsistence level payments for unemployed senior flight attendants lacking such income. I am aware of no authority, however, authorizing such a solution.

3 Some of the displaced senior flight attendants probably now have comparable or nearly-comparable jobs. Such persons would doubtless favor a stay rather than be forced at this point to elect between the jobs they have and a return to TWA that may be ephemeral.

late March, to give unqualified promises to trainees that they would not be displaced at the end of the strike even if they had not completed training. Tensions at the training center had not reached the level in March where TWA was swayed by facts rather than legal and economic assumptions when it offered permanent jobs to the trainees.[4]

It therefore seems that the appeal will likely turn on whether the appellate court agrees with me that there should be a "training school exception" to the *Mackay Radio* rule allowing the hiring of permanent replacements for economic strikers.

I continue to believe that *Mackay Radio* should be confined to its own essential fact situation, an appraisal of what is reasonably needed to induce prospective strike replacements to go through a hostile picket line to perform the tasks of the strikers. In confining *Mackay Radio* to the situs of the "combat duty" I have nothing to offer as precedent other than my understanding of the Supreme Court's rationale in *Mackay Radio*. In the only case either party has cited as having direct bearing on the "training school exception," Judge Bua assumed there was no such exception. The issue to be ruled is thus close and lacking in precedent.

Where a trial court ruling would require important changes in the status quo and the issues are novel or close, stays seem to be granted with little further analysis. *E.g.*, *In re Bradley*, 456 F.2d 6 (4th Cir. 1972) (school district merger order in segregation case); *Henderson v. State of Oregon*, 405 F. Supp. 1271, 1277 (D.Or. 1975) (adoption of "unisex" life expectancy tables by public officials should not be required "until and unless this decision is upheld on appeal"); *Davis v. Reagan*, 485 F. Supp. 1255 (S.D.Iowa 1980) (60-day stay in welfare program case).

Efforts have been made to formulate standards for granting stays on appeal. While sometimes helpful to analysis, I suspect that the ultimate rule must be as broadly stated as it was in

4 As noted in my prior decision denying reconsideration of the September 9 ruling, the events in April might or might not have occurred in the absence of an offer of permanent jobs to trainees. It would be speculative to treat those later events as justifying the prior decision to offer permanent jobs to trainees.

Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 844-5 (D.C.Cir. 1977), where it was said that trial courts "may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status should be maintained."

I reemphasize that it is the status quo when this controversy began that is probably the decisive factor here. A stay will therefore issue.

The bond to be posted by TWA should reflect ongoing wage obligations of about $1 million per month. Assuming an appellate decision early next year, an $8 million bond will be required. It is therefore ORDERED that TWA's obligation under the September 9 ruling to offer reinstatement and back pay to certain senior flight attendants is stayed pending appeal, subject to TWA's filing with the court an $8 million bond, approved by the court, within ten (10) days of this order.

/s/

HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1986.

APPENDIX F

Text of Statutes Involved

RAILWAY LABOR ACT

45 U.S.C. § 151. *Definitions; short title*

When used in this chapter and for the purposes of this chapter—

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

§ 152. *General duties*

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have their right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in

this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly

required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

* * *

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§ 181. *Application of subchapter I to carriers by air*

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182. *Duties, penalties, benefits, and privileges of subchapter I applicable*

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 152. *Definitions*

When used in this subchapter—

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

APPENDIX G

IFFA's Corrected First Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, an Unincorporated Labor Organization, 630 Third Avenue, New York, New York 10017,

Plaintiff,

vs.

TRANS WORLD AIRLINES, INC., Kansas City International Airport, Kansas City, Missouri,

Defendant.

FIRST AMENDED COMPLAINT

Comes now Plaintiff, the Independent Federation of Flight Attendants (hereinafter "IFFA") and for its complaint against Defendant, Trans World Airlines, Inc. (hereinafter "TWA"), states the following:

COUNT ONE

1. This action arises under and this Court's jurisdiction is invoked pursuant to the Railway Labor Act as amended (hereinafter "RLA"), 45 U.S.C. §151, *et seq.*, and 28 U.S.C. §1331 and 28 U.S.C. §1337. This Court has jurisdiction under 28 U.S.C. §2201 to grant the declaratory relief requested.

2. Venue properly lies in this judicial district pursuant to 28 U.S.C. §1391.

3. Plaintiff IFFA is a voluntary unincorporated labor organization with its principal office and headquarters located at 630 Third Avenue, New York, New York. Since April 1, 1977, IFFA has been and is certified by the National Mediation Board (hereinafter "NMB") as the duly designated and authorized exclusive bargaining representative under the RLA of all TWA employees in the flight attendant craft or class, including flight attendants in this judicial district.

4. Plaintiff IFFA is a "representative" within the meaning of the RLA and is subject to its provisions.

5. Defendant TWA is a corporation duly organized and existing under the laws of the State of Delaware and is engaged in the common carriage by air in interstate and foreign commerce of persons, property and mail. TWA maintains offices, an overhaul base, and a training center in this judicial district, and operates flights to and from the Kansas City International Airport which is located within this judicial district.

6. Defendant TWA is a "common carrier by air", within the meaning of Title II of the RLA, and accordingly a "carrier" within the meaning of Title I of the RLA, and is subject to the provisions of the RLA.

7. On April 12, 1983, TWA and IFFA signed an Agreement (hereinafter "the 1983 Agreement"), establishing the rates of pay, rules and working conditions of the flight attendants in the service of TWA.

8. Under Article 1 of the 1983 Agreement, all TWA flights which require flight attendants on board the aircraft must be operated in accordance with the provisions of the Agreement, and all flight attendants employed by TWA are subject to the provisions of the Agreement.

9. Under Article 2 of the 1983 Agreement TWA flight attendants are classified into three categories, cabin attendants, flight pursers, and service managers. Each of those flight attendant categories is defined in Article 2 of the Agreement.

10. Article 28 of the 1983 Agreement provides, with respect to the duration of said agreement:

> Except as otherwise specified in this Agreement, this entire Agreement shall be effective August 1, 1981 and shall remain in effect until July 31, 1984 and thereafter shall renew itself without change for yearly periods unless written notice of intended change is served in accordance with Section 6, Title I of the Railway Labor Act, as amended, by either party hereto, at least ninety days prior to the renewal date each year.

11. By letter dated February 29, 1984, and pursuant to Section 6 of the RLA, 45 U.S.C. §156, and Article 28 of the 1983 Agreement, TWA served upon IFFA notice of intended changes in the Agreement and TWA's proposals relating to such changes.

12. By letter dated April 27, 1984, and pursuant to Section 6 of the RLA and Article 28 of the 1983 Agreement, IFFA served upon TWA notice of intended changes in the Agreement and IFFA's proposals relating to such changes.

13. Between March 29, 1984 and March 6, 1986, IFFA and TWA representatives met in conference on numerous occasions to discuss said proposed changes in the Agreement.

14. On or about May 13, 1984, TWA invoked the services of the NMB to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

15. No agreement had been reached in the TWA-IFFA negotiations by February 4, 1986 and on that date, in accordance with RLA Section 5 first, the NMB notified TWA and IFFA

that the 30-day "cooling off" period mandated by RLA Section 5 First had begun.

16. Pursuant to that notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

17. On March 5, 1986, IFFA commenced an action in the United States District Court for the Western District of Missouri, Civil Action No. 86-6030-CV-SJ-6, alleging, *inter alia*, that TWA had violated the RLA by failing to exert every reasonable effort to reach agreement and seeking a temporary restraining order to enjoin TWA from unilaterally implementing any proposed changes in flight attendant rates of pay, rules or working conditions or taking any other action that would alter the then existing status quo. IFFA's request for a temporary restraining order was denied on March 5, 1986.

18. The parties were unable to agree upon acceptable changes to the agreement by midnight, March 6, 1986. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986. Also, TWA announced its intention to unilaterally implement many of its previously proposed changes in flight attendant rates of pay, rules and working conditions.

19. On March 18, 1986, IFFA filed an amended complaint in Civil Action No. 86-6030-CV-SJ-6 alleging, *inter alia*, that IFFA's strike was caused in whole or in part by unlawful actions of TWA and requesting *inter alia* that the court issue a declaratory judgment that IFFA's strike was an unfair labor practice strike and that all employees engaged therein were unfair labor practice strikers and as such are entitled to reinstatement to their jobs upon an unconditional offer to return to work, notwithstanding that "permanent replacements" have been hired.

20. IFFA still contends that its strike was an unfair labor practice strike and that its striking members are entitled to reinstatement to their jobs as unfair labor practice strikers upon an unconditional offer for the strikers to return to work.

21. IFFA's strike continued until May 17, 1986 when IFFA made an unconditional offer to TWA on behalf of all striking flight attendants to return to work.

22. On information supplied by TWA, at various times in the weeks and days preceding March 7, 1986, TWA offered to hire in excess of 1,274 individuals as flight attendants commencing their employment on or about March 7, 1986. Said offers stated that if said individuals would take certain steps, including notification to TWA that they were able to commence working on March 7, 1986 and reporting in person when notified to so, "you will become an employee of TWA on that day regardless of whether or not a work stoppage occurs and subject to immediate duty assignment".

23. Pursuant to said offers, on information supplied by TWA, approximately 1,274 individuals were hired during the week beginning March 7, 1986 as flight attendants. Said individuals were hired, not as "permanent replacements" for striking flight attendants, but rather as permanent additions to TWA's flight attendant work force. As of May 17, 1986, on information supplied by TWA, approximately 1,220 of said individuals were still working as flight attendants. All or nearly all of said individuals have less seniority and/or length of service with TWA than the flight attendants who were on strike until May 17, 1986.

24. On information supplied by TWA, as of May 17, 1986, the date of IFFA's unconditional offer on behalf of the strikers to return to work, approximately 463 individuals were enrolled in training classes at TWA's Training Center in Kansas City, Missouri in an effort to become qualified to be employed as flight attendants. At the time of IFFA's unconditional offer on behalf of striking flight attendants to return to work, those individuals who had not yet completed the required training to

qualify as flight attendants were not employed, and could not lawfully be employed, as flight attendants, and therefore, were not and are not "permanent replacements" for striking flight attendants. On information and belief, certain of those individuals who were still trainees as of May 17, 1986, have completed training since that date and have been employed in flight attendant positions, while other such trainees failed to complete training or were unsuccessful in their efforts to become qualified as and be hired to be flight attendants.

25. On information supplied by TWA, TWA continued after May 17, 1986, to temporarily utilize non-flight attendant employees (such as reservation agents, etc.) to work as "contingency" flight attendants. Such temporary "contingency" employees were not and are not "permanent replacements" for striking flight attendants.

26. At various times during IFFA's strike prior to IFFA's May 17, 1986 unconditional offer to return to work, approximately 1,300 striking flight attendants abandoned the strike and returned to work as flight attendants for TWA (they shall hereinafter the referred to as "cross-over strikers"). Those cross-over strikers were not and are not "permanent replacements" for the flight attendants who continued to strike until May 17, 1986 (who shall hereinafter be referred to as "full-term strikers"). Many of the full-term strikers have greater seniority and/or length of service with TWA than many of the cross-over strikers.

27. Despite IFFA's continuing contention that its strike was an unfair labor practice strike and that TWA, having received an unconditional offer to return to work, must reinstate all the full-term strikers to their jobs, TWA contends that IFFA's strike was solely an economic strike, not an unfair labor practice strike, and TWA has failed and refused to reinstate all the full-term strikers to their jobs.

28. By letter dated May 23, 1984, TWA notified IFFA that it has frozen its active permanent Flight Attendant work force and has placed all full-term strikers on a preferential rehire list

from which they shall be rehired for active service, if immediately available for such service, to fill vacancies in order of seniority.

29. By letter dated May 28, 1986, TWA notified IFFA that it has recalled to employment only 197 of the approximately 5,000 full-term strikers.

30. On information and belief, TWA has assigned some number of the recalled 197 full-term strikers and has announced that it will in the future continue to assign some full-term strikers to be recalled in the future to job categories and/or domicile cities other than those held by such full-term strikers at the time of the commencement of the strike.

31. On information and belief, TWA is treating the flight attendants described above in paragraphs 22 and 23 who were hired as permanent additions to the flight attendant work force on or after March 7, 1986, as if they were permanent replacements for full-term strikers.

32. On information and belief, TWA is treating the individuals who as of May 17, 1986 were still in training attempting to become qualified to be employed as flight attendants as if they were permanent replacements for full-term strikers.

33. On information and belief, TWA has discriminated against and continues to discriminate against many of the full-term strikers because of their exercise of the right to strike under the RLA by failing and refusing to reinstate them to flight attendant positions occupied on and after May 17, 1986 by:

(a) Cross-over strikers who have less seniority and/or length of service with TWA;

(b) The post-March 7, 1986 permanent additions to the flight attendant work force who likewise have less seniority and/or length of service with TWA;

(c) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(d) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

34. On information and belief, TWA has refused and continues to refuse to allow flight attendants who were never on strike (those who as of March 7 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and/or domicile cities upon expiration of their authorized leaves, in effect treating them as full-term strikers.

35. Irrespective of whether IFFA's strike was an unfair labor practice strike as IFFA contends or an economic strike as TWA contends, TWA's conduct described herein violates the RLA, 45 U.S.C. §§151 *et seq*.

WHEREFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that pending the court's determination of the issues presented in Civil Action No. 86-6030-CV-SJ-6, TWA is required by the RLA to reinstate full-term strikers in seniority order to their former job categories and domicile cities to the extent that those flight attendant positions may after May 17, 1986 have been occupied by:

(1) Cross over strikers who have less seniority and/or length of service with TWA;

(2) The post-March 7, 1986 permanent additions to the flight attendant work force who have less seniority and/or length of service with TWA;

(3) The temporary non-flight attendant "contingency" employees who continued to work as flight attendants after May 17, 1986; and

(4) The individuals who, as of May 17, 1986, had not yet completed the training necessary to be qualified to be employed as flight attendants.

(c) A declaratory judgment stating that TWA is required to permit those flight attendants who were never on strike (those who as of March 7, 1986 and thereafter were or should have been on an authorized leave or leave of absence) to return to their former job categories and domicile cities upon expiration of their authorized leaves.

(d) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers and non-strikers whose reinstatement rights under the RLA are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

COUNT TWO

36. Plaintiff hereby realleges and incorporates by reference all the allegations set forth in paragraph 1 through 35 of Count One above.

37. On information supplied by TWA, at various times after the first week of the strike, approximately 1,127 individuals were hired as purported "permanent replacements" for striking flight attendants. Said individuals were in addition to the approximately 1,220 permanent additions to the work force described in paragraphs 22, 23 and 31 of Count One and the approximately 463 trainees described in paragraphs 24 and 32 of Count One. Thus, based upon information supplied by TWA, as of May 17, 1986, there were a total of approximately 2,810 individuals TWA contends were and are "permanent replacements" for full-term strikers.

38. TWA had no legitimate and substantial business justification for hiring purported "permanent replacements", as distinguished from temporary replacements, in order to continue to operate during the strike.

39. Since IFFA's May 17, 1986 unconditional offer on behalf of the full-term strikers to return to work, TWA has discriminated against and continues to discriminate against each and every full-term striker because of her/his exercise of the right to strike under the RLA by failing and refusing to reinstate each of them, to the flight attendant position she/he held prior to the strike.

WHEREFORE, plaintiff respectfully requests that this court grant the following relief:

(a) Consolidation of this action with *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, Civil Action No. 86-6030-CV-SJ-6, now pending before this Court;

(b) A declaratory judgment stating that from and after the May 17, 1986 unconditional offer to return to work, TWA was and is required by the RLA to reinstate each and every full-term striker in seniority order to his/her former job category and domicile city.

(c) A judgment for backpay and all other benefits of employment necessary to make whole those full-term strikers whose reinstatement rights under the RLA have been, are being or will have been violated by TWA's conduct described herein by time of trial.

(e) Such other or additional relief as shall be deemed appropriate.

JOLLEY, WALSH, HAGER & GORDON
1125 Grand Avenue, Suite 1300
Kansas City, Missouri 64106

By: /s/
William A. Jolley

By: /s/
Doyle R. Pryor

[Certificate of Service Omitted]

APPENDIX H

Stipulations, filed July 21, 1986, with Excerpt from Exhibit 1 (1981-1984 Collective Bargaining Agreement between TWA and IFFA)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION
Civil Action
No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant.

STIPULATIONS

The parties stipulate that the following facts are not in dispute. They do not stipulate that this is an all-inclusive statement of material facts and each party expressly reserves the right to submit affidavits and/or other evidence as to additional material facts.

1. Exhibit 1 attached is a true and correct copy of the Agreement signed April 12, 1983 between TWA and its flight attendants as represented by IFFA.

2. Exhibit 2 attached is a true and correct copy of TWA's February 29, 1984 notice to IFFA.

3. Exhibit 3 attached is a true and correct copy of the affidavit (with supporting exhibits) of R. Stan Henderson, TWA's Director of In-Flight Services Training, filed by TWA in Civil Action No. 85-1192-CV-W-0 in the Western Division of this Court.

4. The pre-employment flight attendant training program at TWTC, as described in the Henderson affidavit and supporting exhibits (Exhibit 3), continued substantially unchanged from October 1985 until March 7, 1986. During this period, trainees received some, but not all of the service and customer awareness training received by students trained earlier in 1985, resulting in a reduction in total training days from 25 to 17 days.

5. Exhibit 4 attached is a true and correct copy of IFFA's April 27, 1984 notice to TWA.

6. After March 29, 1984, IFFA and TWA representatives met in conference from time to time to discuss their proposals.

7. On or about May 13, 1984, TWA invoked the services of the National Mediation Board ("NMB") to assist the parties, through mediation, in reaching agreement. The NMB docketed the dispute and, on or about July 12, 1984, appointed a mediator to assist the parties in their negotiations.

8. No agreement had been reached in the IFFA-TWA negotiations by February 4, 1986 and on that date, the NMB notified TWA and IFFA that the 30-day "cooling off" period had begun.

9. Pursuant to the NMB's notification, if the parties were unable to arrive at a mutually acceptable agreement by midnight, March 6, 1986, both parties would be free to resort to self-help.

10. On March 5, 1986, IFFA commenced Civil Action No. 86-6030-CV-SJ-6 in the United States District Court for the Western District of Missouri.

11. TWA and IFFA were unable to reach agreement by midnight, March 6, 1986.

12. IFFA commenced a strike against TWA in the first hour of Friday, March 7, 1986.

13. Commencing March 7, 1986, and since then, TWA has made various changes in flight attendant rates of pay, rules and working conditions without agreement by IFFA.

14. Exhibit 5 attached hereto is a true and accurate copy of a letter delivered at 10:00 P.M., May 17, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President - Labor Relations, J.W. Hoar.

15. Exhibit 6 attached hereto is a true and accurate copy of a letter delivered on May 18, 1986, by IFFA's President, Victoria Frankovich to TWA's Vice President - Labor Relations, J.W. Hoar.

16. Exhibit 7 attached hereto is a true and accurate copy of a letter delivered on May 20, 1986, by J.W. Hoar to Victoria Frankovich.

17. Exhibit 8 attached hereto is a true and accurate copy of a letter delivered on May 21, 1986 by Victoria Frankovich to J.W. Hoar.

18. TWA's business records show that at various times in the weeks preceding the commencement of the strike, it sent mailgrams identical to the example attached hereto as Exhibit 9 (or other written communications substantially similar in content, attached as Exhibit 10-A, B and C hereto) to approximately 1,500 individuals who had completed flight attendant training at TWTC on or before March 6, 1986.

19. TWA's business records show that during the first several days of the strike approximately 1,274 individuals who received Exhibit 9 or 10 were hired as flight attendants. Regardless of their date of report, they were all assigned line seniority dates of March 7, 1986, with the exception of a few who received Exhibit 10-C, and postponed their dates of report.

20. TWA's business records show that as of May 17, 1986, of the original 1,274 flight attendants hired during the first several days of the strike, approximately 1,220 were still working as flight attendants. Of this number, approximately 62 were domiciled in Boston, 260 in New York, 515 in St. Louis, 272 in Los Angeles, and 111 in San Francisco.

21. Individuals who began training on and after March 10, 1986 at the TWTC were hired as TWA employees on their first day of training. Beginning on or about March 10, 1986, individuals who were then enrolled in the TWTC and who had entered training prior to March 8, 1986, were informed that they were TWA employees effective March 8, 1986. True copies of blank forms to be completed by and materials furnished to individuals hired on and after March 8, 1986 are attached as Exhibit 11 hereto.

22. Exhibit 12 attached is a true and accurate copy of an outline provided by TWA to instructors of flight attendants for use during the first week or ten days of the strike.

23. TWA's business records show that after the first several days of the strike approximately 1,590 additional individuals were hired. Of this number, TWA's records show that approximately 1,127 had completed initial flight attendant training as of May 17, 1986, and approximately 463 had not completed initial flight attendant training at TWTC as of May 17, 1986.

24. The approximately 463 individuals who had not completed initial flight attendant training as of May 17, 1986, were hired and trained in anticipation of flight attendant vacancies that were expected to open in June, 1986. Some of said trainees who had completed training after May 17, 1986 were used as active flight attendants beginning the last week of May, during the transition period into the peak June schedule.

25. TWA's business records show that all of the flight attendants who were newly-hired after the commencement of the strike, and who actually worked one or more flights as

active flight attendants, were classified as "cabin attendants" as distinguished from "flight pursers" or "service managers".

26. TWA's business records show that approximately 1,284 individuals who were employed as flight attendants immediately prior to the commencement of the strike crossed the IFFA picket lines and reported to work before 10:00 P.M., May 17, 1986. The breakdown of this group (which shall be referred to as "cross-overs") by domicile and job category is as follows:

Domicile	*Service Managers*	*Cabin Attendants*	*Total*
Boston	23	5	28
New York	160	388	548
St. Louis	47	441	488
Los Angeles	62	99	161
San Francisco	28	31	59
	320	964	1,284

27. TWA has credited the cross-overs with the length of service they had as of March 7, 1986, plus whatever additional length of service they accrued by working during the strike.

28. As of May 17, 1986, there were several hundred cross-overs working as flight attendants who had less length of service with TWA than certain flight attendants, who were on strike as of May 17, 1986, had as of March 7, 1986.

29. All, or nearly all of the individuals hired on or after March 7, 1986, who were working as flight attendants as of May 17, 1986, have less length of service with TWA than the flight attendants who were on strike as of May 17, 1986, had as of March 7, 1986.

30. Exhibit 13 attached is a true and accurate copy of a letter dated May 23, 1986 from J.W. Hoar to Victoria Frankovich.

31. Exhibit 14 attached is a true and accurate copy of one example of a form letter that was sent by TWA on or about May 24, 1986 to approximately 197 flight attendants who as of

that date were shown on TWA's records as having been on strike on May 17, 1986.

32. Exhibit 15 attached is a true and accurate copy of a letter hand delivered May 28, 1986, from J.W. Hoar to Victoria Frankovich, including a list of 197 flight attendants whom TWA had contacted for return to active service.

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ARTICLE 24

UNION SECURITY

(A) Each employee now or hereafter employed in any classification covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the date such employee enters training become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such conditions shall not apply with respect to any employee to whom such membership is not available upon the same terms and conditions as are generally applicable to any other member of his classification, or with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his/her classification as a condition of acquiring or retaining membership.

The condition of payment shall be met if the amount due is tendered to the Secretary-Treasurer of the Union in person or is mailed to him/her within the prescribed time limits.

For the purpose of this Article, "membership in good standing in the Union" shall consist of the payment by the employee, not later than the last day of the following calendar month, of dues for each calendar month and initiation fees (not including fines and penalties), which are uniformly required of members of his/her classification as a condition of acquiring or retaining membership. The employee may have his monthly membership dues deducted from his earnings as provided in paragraph (M) of this Article, or he/she may pay his/her membership dues directly to the Union.

* * *

APPENDIX 1

Plaintiff IFFA's Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-CV-SJ-6

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC,
Defendant.

PLAINTIFF IFFA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now Plaintiff, the Independent Federation of Flight Attendants (hereinafter "IFFA"), by and through its undersigned counsel, and respectfully moves this Court for an order granting Plaintiff IFFA summary judgment in its favor on Count I of its First Amended Complaint in Civil Action No. 86-6084-CV-SJ-6 and directing Defendant TWA to reinstate those flight attendants who remained on strike until May 17, 1986 ("Full-term strikers"), the date of Plaintiff IFFA's unconditional offer to return to work, to those jobs that on or after May 17, 1986 have been occupied by: (1) nearly 1,300 less senior flight attendants who crossed IFFA's picket lines and returned to work prior to the union's unconditional offer to return (the "cross-overs"), (2) some 1,220 flight attendants who were hired during the first few days of the strike as

"permanent additions" to the work force, rather than as "permanent replacements" for strikers, and (3) approximately 463 individuals who, as of May 17, 1986, had not yet completed the initial training necessary to be qualified to be employed as flight attendants, and for whom no job vacancies yet existed as of that date on the grounds that there are no material issues of fact in dispute and Plaintiff is entitled to Summary Judgment as a matter of law.

Plaintiff IFFA files herewith its Suggestions in Support of its Motion for Partial Summary Judgment.

Respectfully submitted,

JOLLEY, WALSH, HAGER & GORDON
1125 Grand Avenue, Suite 1300
Kansas City, Missouri 64106
Tel: 816-474-1240

By /s/
Doyle R. Pryor

/s/
John P. Hurley

/s/
Scott A. Raisher

[Certificate of Service Omitted]

APPENDIX J

Defendant TWA's Cross-Motion for Partial Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

Civil Action

No. 86-6084-CV-SJ-8

THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Plaintiff,

vs.

TRANS WORLD AIRLINES, INC.,
Defendant.

DEFENDANT TWA'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Trans World Airlines, Inc. ("TWA"), by and through its undersigned counsel, respectfully moves this Court for an order denying the motion of Plaintiff Independent Federation of Flight Attendants ("IFFA") for summary judgment in its favor on Count I of IFFA's First Amended Complaint herein, and granting summary judgment in TWA's favor on Count I of the First Amended Complaint.

TWA files herewith its Suggestions in Opposition to IFFA's Motion for Partial Summary Judgment and in support of TWA's Cross-Motion for Partial Summary Judgment in its favor, with the supporting affidavits with appended exhibits of William S. Borden, R. Stan Henderson, J.W. Hoar, Joyce Coleman, Donald Fleming, Jill Jones and Dirk Siedlecki.

Respectfully submitted,

Dated: Kansas City, Missouri
August 12, 1986

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[Certificate of Service Omitted]

APPENDIX K

Scheduled Skyways, Inc., 10 N.M.B. 488 (1983)

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

10 NMB No. 153

CASE NO. R-5419

In the Matter of the
Application of the

AIR LINE PILOTS ASSOCIATION

alleging a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act

involving employees of

SCHEDULED SKYWAYS, INC.

DETERMINATION OF ELIGIBILITY

September 2, 1983

On June 13, 1983, the Air Line Pilots Association (ALPA) filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. §152, Ninth, alleging the existence of a representation dispute involving employees of Scheduled Skyways, Inc. designated as "Flight Deck Crew." This application has been docketed as NMB Case No. R-5419.

At the time the application was filed, these employees were not represented by any organization or individual.

The Board assigned Board Representative Samuel J. Cognata to investigate. On August 10, 1983, the Board found a dispute to exist, and authorized an all-mail ballot election using a cut-off date of August 7, 1983.

During the course of the investigation, ALPA objected to the inclusion of James Osburn and Robert Shields, claiming that these employees were ineligible as they were in training as of the cut-off date. Board Representative Cognata ruled these employees ineligible, and the carrier appealed this ruling on August 22, 1983. On August 25, 1983, the Board postponed the ballot count, scheduled for September 2, until this eligibility issue had been resolved. On August 29, 1983, ALPA advised the Board that it now concurred with the carrier that James Osburn and Robert Shields are eligible voters. [489]

ISSUE

The issue is whether James Osburn and Robert Shields are ineligible to vote due to their status as trainees.

CONTENTIONS

The carrier asserts that Osburn and Shields are eligible because they are licensed pilots who share a complete community of interest with the pilots determined to be eligible in this case. The carrier further contends that a *bona fide* employer-employee relationship existed between the carrier and Osburn and Shields prior to and on the cut-off date. ALPA concurs with the carrier that these employees are eligible.

FINDINGS OF LAW

Determination of the issues here involved is governed by Section 201, Title II, and Section 2, Title I, of the Railway Labor Act, as amended, 45 U.S.C. §181, 152. Accordingly, the Board finds as follows:

I.

Scheduled Skyways, Inc. is a common carrier by air as defined in Title II, Section 201 of the Act, 45 U.S.C. §181.

II.

Section 2, Fourth, of the Act, 45 U.S.C. §152, Fourth, gives employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the the representatives of the craft or class for the purposes of this Act." [490]

III.

Section 2, Ninth, of the Act, 45 U.S.C. §152, Ninth, requires the National Mediation Board to investigate disputes which arise among a carrier's employees over representatives of such employees, if any. In determining the choice of the majority of employees under this section, the Board is required to designate who may participate as eligible voters in the event an election is required.

IV.

ALPA is a labor organization and representative as defined in Section 1, Sixth, 45 U.S.C. §151, Sixth, and Section 2, Ninth, 45 U.S.C. §152, Ninth, of the Act.

FINDINGS OF FACT

I.

James Osburn was hired by the carrier as a pilot on July 24, 1983. He began his ground school training on August 5 and completed it on August 11. He began flight training on August 13, 1983.

II.

Robert Shields was hired as a pilot on July 10, 1983, began ground school training on July 22, and completed ground school training on August 11. Shields began flight training on August 13, 1983.

III.

According to the Carrier, both Osburn and Shields have received the minimum monthly flight pay guarantee during their training, and have enjoyed the same fringe benefits as other pilots, including vacation benefits, and health and welfare benefits. Both Osburn and Shields report to the same supervisory officials and are subject to the same policies and procedures as pilots who have completed their training. [491]

IV.

Robert Shields began on-line flying for the carrier on August 18, 1983. James Osburn commenced on-line flying on August 16, 1983.

DISCUSSION

I.

Training is required for all pilots under the Federal Aviation Regulations, and pilots receive training throughout their careers. *See, e.g., United Airlines*, 9 NMB No. 79 (1982) and 10 NMB No. 145 (1983).

II.

In *Midstate Airlines*, NMB Case No. R-4668 (1976), when faced with the same factual circumstances, the Board found a pilot in training to be eligible to vote. No evidence has been presented which would indicate a different result here where the employees in training are receiving the same pay and benefits as the other pilots.

CONCLUSION

The Board finds that Osburn and Shields were part of the craft or class of "Flight Deck Crew Members" on Scheduled Skyways as of the cut-off date, and are, therefore, eligible to vote. [492]

Based on the foregoing, the carrier's appeal of Board Representative Cognata's eligibility ruling is upheld. Ballots previously impounded will be counted forthwith.

By direction of the NATIONAL MEDIATION BOARD.

/s/
Rowland K. Quinn, Jr.
Executive Secretary

Copies to:

Mr. Robert L. Shults
Laurence R. Arnold, Esq.
Mr. John P. Bradley
Robert A. McCullough, Esq.
Mr. Henry A. Duffy
Mr. Samuel J. Cognata

RKQ/mja